

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958⁷

No. ~~103~~ 6

DANIEL J. SENTILLES, PETITIONER.

vs.

INTER-CARIBBEAN SHIPPING CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 14, 1958
CERTIORARI GRANTED MARC

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 448

DANIEL J. SENTILLES, PETITIONER,

vs.

INTER-CARIBBEAN SHIPPING CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 5]

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR
THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION.

No. 6842-M-Civil.

DANIEL J. SENTILLES, Plaintiff,

vs.

INTER-CARIBBEAN SHIPPING CORPORATION, BEN W. LAMSON
and/or B. W. LAMSON, Defendants.

Action by Seaman Without Prepayment of Costs or
Fees Pursuant to Special Rules.

AMENDED COMPLAINT—Filed October 2, 1956

The Plaintiff, by and through his undersigned attorneys,
sues the Defendants for that:

As and For a First Cause of Action.

The Plaintiff sues the Defendants for that:

1. At all the times hereinafter mentioned the Defendant, Inter-Caribbean Shipping Corporation, was and now is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and at all said times was and is doing business in the State of Ohio, with an office for the regular transaction of business within the jurisdiction of this Court.

2. At all the times hereinafter mentioned, the Defendant, Ben W. Lamson and/or B. W. Lamson, is a citizen of the United States and resides within the jurisdiction of this Court.

3. At all the times hereinafter mentioned, the Defendant, Ben W. Lamson and/or B. W. Lamson, was and still [fol. 6] is the owner of all the capital stock of Inter-Caribbean Shipping Corporation.

4. At all the times hereinafter mentioned, the S. S. Montego was documented and registered under the laws of the Republic of Liberia.

5. At all the times hereinafter mentioned, the Defendants, or either one of them, owned, operated, managed, controlled, provisioned and supplied the S. S. Montego.

6. At all the times hereniafter (sic) mentioned, and for a long time prior thereto, the S. S. Montego was engaged in voyages between ports in the United States and ports in South America, and return to ports in the United States.

7. The Defendants, or either one of them, employed the Plaintiff and the Plaintiff was in the employ of the Defendants as Chief Engineer of the S. S. Montego from on or about March 15, 1953 to on or about April 25, 1953.

8. Early in April of 1953, (Plaintiff does not recall the exact date; it can be fixed and determined by the vessel's original logbooks), while the S. S. Montego was at sea en route to the port of Miami, Florida, and while the Plaintiff was engaged in the course of his duties as Chief Engineer, in crossing the forward deck of the ship, he was struck by seas and he thereby sustained serious and permanent personal injuries.

9. The Plaintiff was injured as aforesaid in that the Defendants breached their absolute duty to provide the [fol. 7] Plaintiff with a seaworthy vessel, appurtenances, appliances, equipment and personnel.

10. By reason of the said personal injuries, Plaintiff has been disabled, has suffered and will suffer physical pain and mental anguish, has been and will be prevented from attending to his work, has lost and will lose sums of money which he otherwise would have earned, and has been obliged to undergo medical care and attention and is still undergoing the same, and Plaintiff will be permanently injured, all to his damage.

Wherefore, the Plaintiff demands judgment against the Defendants in the sum of Seventy-Five Thousand Dollars (\$75,000.00).

The Plaintiff demands a trial by jury of all of the issues in this action triable as of right by a jury.

As and for a Second Cause of Action.

The Plaintiff, sues the Defendants for that:

1. The Plaintiff herein repeats and reiterates each and every allegation contained in Paragraphs 1 through 10 of the First Cause of Action, as aforesaid.

2. The Plaintiff was injured as aforesaid wholly and solely through the negligence of the Defendants, their agents, servants and employees, in failing and neglecting to provide the Plaintiff with a seaworthy vessel, appurtenances, appliances and equipment; in failing and neglecting to take the customary steps to protect his person; in failing and neglecting to provide him with safe and com-[fol. 8] petent superiors, fellow servants and co-employees; in failing and neglecting to provide him with a safe place in which to work, and through the negligence of the Defendant's agents, servants and employees.

3. The Plaintiff is a merchant seaman and this action is brought to recover damages for personal injuries under a Federal statute, to wit, Section 33 of the Merchant Seamen's Act of June 5, 1920, amending Section 20 of the Seamen's Act of March 4, 1915, and jurisdiction herein is claimed by virtue of said statute.

Wherefore, the Plaintiff demands judgment against the Defendants in the sum of Seventy-Five Thousand Dollars (\$75,000.00).

The Plaintiff demands a trial by jury of all of the issues in this action triable as of right by a jury.

As and For a Third Cause of Action.

The Plaintiff sues the Defendants for that:

1. The Plaintiff herein repeats and reiterates each and every allegation contained in paragraphs 1 through 10 inclusive of the First Cause of Action, as aforesaid and further repeats and reiterates each and every allegations

contained in paragraphs 1 through 3 inclusive of the Second Cause of Action, as aforesaid.

2. By reason of the injuries sustained, Plaintiff has been and may be required to spend large sums of money for his maintenance, care and cure, all to his damage, to [fol. 9] wit: The Plaintiff's medical expenses to date are as follows:

1. Hotel Dieux Sisters Hospital	\$211.36
2. U. S. Public Health Hospital	253.00
3. Dr. Taquino	150.00
4. Dr. Charbonet	85.00
5. Dr. LeDoux	57.00
6. Dr. Karl Fishbach	25.00

Wherefore, the Plaintiff demands judgment against the Defendants in the sum of Seven Hundred Eighty-One and 36/100ths (\$781.36) Dollars.

The Plaintiff demands a trial by jury of all of the issues in this action triable as of right by a jury.

Dated at Miami Beach, Florida, this 1st day of October, 1956.

Kelner & Lewis, By Alan H. Dombrowsky, Attorneys
for Plaintiff, 420 Lincoln Road, Miami Beach,
Florida.

Certificate of Service (omitted in printing).

[fol. 10]

IN UNITED STATES DISTRICT COURT

ANSWER TO AMENDED COMPLAINT—Filed October 9, 1956

Defendants, by and through their undersigned attorneys, answer the Amended Complaint of plaintiff as follows:

As to the First Cause of Action.

1. Defendant Inter-Caribbean Shipping Corporation exists and was organized under the laws of the Republic of

Liberia and that the defendant Inter-Caribbean Shipping Corporation does not do business in the State of Ohio nor is it organized under the laws of the State of Ohio.

2. Defendant B. W. Lamson and or Ben W. Lamson is a citizen of the State of Ohio and has his residence there.

3. Defendants admit Paragraph 3 of plaintiff's Amended Complaint.

4. Defendants admit Paragraph 4 of plaintiff's Amended Complaint.

5. Defendant Inter-Caribbean Shipping Corporation admits the ownership of the S. S. Montego but denies the remaining allegations of Paragraph 5 of plaintiff's Amended Complaint. Defendant Lamson denies all allegations of Paragraph 5.

[fol. 11] 6. Defendants admit the allegations of Paragraph 6 of plaintiff's Amended Complaint.

7. Defendants (sic) deny the allegations of Paragraph 7 of plaintiff's Amended Complaint and allege that plaintiff was employed by the defendant corporation as General Manager of its operations.

8. Defendants deny the allegations of Paragraph 8 of plaintiff's Amended Complaint.

9. Defendants deny the allegations of Paragraph 9 of plaintiff's Amended Complaint.

10. The defendants are without knowledge of the allegations of Paragraph 10 of plaintiff's Amended Complaint.

As to the Second Cause of Action.

1. The defendants answer Paragraph 1 of this cause of action by stating and reiterating each and every answer contained in Paragraphs 1 through 10 of its answer to the first cause of action.

2. The defendants deny the allegations of Paragraph 2 of plaintiff's Amended Complaint in this cause of action.

3. The defendants are without knowledge and therefore deny the allegations of Paragraph 3 of plaintiff's Amended Complaint in this cause of action.

[fol. 12] . As to the Third Cause of Action.

1. The defendants answer Paragraph 1 of this cause of action by repeating each and every answer made to the allegations in Paragraphs 1 through 10 of the first cause of action of plaintiff's Amended Complaint and as to Paragraphs 1 through 3 of the second cause of action of this Amended Complaint.

2. The defendants are without knowledge and therefore deny the allegations of Paragraph 2 under plaintiff's third cause of action.

Scott, McCarthy, Preston Steel & Gilleland, Marshall
S. Scott, Attorneys for Defendants, 62 Ingraham
Building, Miami 32, Florida.

Certificate of Service (omitted in printing).

[fol. 13]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM PRE-TRIAL CONFERENCE—Filed March 6, 1957

The Court: ~~Is~~ it admitted that he suffered some injury during this voyage?

Mr. Beckham: I think so, yes, sir.

The Court: What was the extent of his injuries that you claim?

Mr. Gladstone: This will have to be proved through medical testimony, through depositions that are yet to be taken, Your Honor.

The Court: What do you contend? Did he have a broken leg, or what?

Mr. Beckham: It seems to me, Your Honor, pneumonia and T.B., as a result of the fall he suffered, is their contention in this case. He was admitted to the hospital and treated as a T.B. patient for some time following the accident, or the fall.

That is what we have learned so far.

The Court: What hospital was he taken to after the fall?

Mr. Gladstone: We have two hospitals, Your Honor. We do not know which one he was taken to. There is one hospital called the "Hotel Dieux".

[fol. 14] The Court: Where was that?

Mr. Gladstone: I believe that was in New Orleans. And the other is the United States Public Health Hospital in New Orleans.

The Court: Any maintenance and cure furnished to the plaintiff?

Mr. Beckham: Some of it was; I don't think all of it.

Mr. Gladstone: We will admit to that, Your Honor.

The Court: How much was furnished?

Mr. Beckham: I don't have that figure readily available, Your Honor. The total is approximately \$781. The amount yet unpaid, as based on the plaintiff's claim, and substantial amounts in addition to that have been paid by the respondent.

The Court: Why has not the \$781 been paid?

Mr. Beckham: Your Honor, we have just gotten some of the information in very recently—copies of the hospital bills for verification; and there was some question in our [fol. 15] minds as to whether all of it was for services rendered in connection with this accident. We will clear it up.

I think everything has been taken care of since we have obtained copies of the bills.

The Court: Has the action for recovery been achieved?

Mr. Beckham: We are informed, by what limited information we have, at this point, that it has been. We are going to take some depositions of the doctors within the near future. We had one scheduled that was postponed and we have two others yet to come up, I think.

We have seen photostatic summaries of the condition as reported in the hospitals, and they seem to indicate

that he had achieved much of that; but his deposition indicated that he is feeling about as good as he ever did.

[fol. 22] On April 8, 1957 Verdict was filed in the words and figures as follows:

[Title omitted]

Miami, Florida

April 5th, 1957

We, the Jury, find for the Plaintiff, Daniel J. Sentilles, and against the Defendant, Inter-Caribbean Shipping Corp., and assess his damages in the amount of \$20,000.00.

So Say We All.

Maurice Orawitz, Foreman.

IN UNITED STATES DISTRICT COURT

In the United States District Court in and for the Southern District of Florida, Miami Division.

6842-M-Civil.

Daniel J. Sentilles, Plaintiff,

vs.

Inter-Caribbean Shipping Corporation, Defendant.

FINAL JUDGMENT—April 8, 1957

Upon consideration of the Verdict of the Jury returned herein, it is, thereupon,

Considered and Ordered that Final Judgment be and it is hereby entered in said cause in favor of the Plaintiff, [fol. 23] Daniel J. Sentilles, and against the Defendant, Inter-Caribbean Shipping Corporation, in the sum of Twenty Thousand Dollars (\$20,000.00), together with legal

interest thereon from date hereof, and may recover his costs in this case incurred, said costs to be taxed by the Clerk of this Court, and that said Plaintiff have execution therefore, it is,

Done and Ordered at Miami, Florida, this 8th day of April, A. D. 1957.

Julian A. Blake, Clerk, U. S. District Court, Southern District of Florida, By Michael Oswald, Deputy Clerk.

(Seal)

[fol. 30]

IN UNITED STATES DISTRICT COURT

In the District Court of the United States for the Southern District of Florida, Miami Division.

No. 6842-M. Civil.

Daniel J. Sentilles, Plaintiff

vs.

Inter-Caribbean Shipping Corporation, Defendant.

Transcript of Trial Proceedings
(Filed April 29, 1957)

Miami, Florida.

The above entitled cause came on for hearing before the Hon. Emmett C. Choate, United States District Judge, and a jury duly and regularly impaneled and sworn to try the same, in open Court, on April 3, 4, 5 and 8, 1957.

APPEARANCES:

Milton Kelner Esq., of the law firm of Kelner & Lewis, appearing on behalf of the Plaintiff.

Marshall S. Scott, Esq. and R. J. Beckham Esq., of the law firm of Scott, McCarthy, Preston, Steel & Gilleland, appearing on behalf of the Defendant.

EXCERPTS FROM DEPOSITION OF ROKO M. KOHN

* * * * *

"Q. Do you remember this accident?

"A. The accident?

"Q. Yes.

"A. Yes, I do.

"Q. Tell us what happened.

[fol. 31] "A. It was some time in the afternoon, I don't know what time exactly, it is very hard to say, I was with the Second Mate on the port side, port side of the bridge—

"Q. What is the name of that Second Mate, Captain?

"A. It is Malanjha.

"Q. That is Roy Malanjha?

"A. Yes.

"Q. The man waiting outside (indicating outer room)?

"A. Yes.

"Q. I didn't mean to interrupt you but I just wanted to clarify this as you go along. Continue.

"A. It was really very rough weather. Sentilles came from the forward part of the ship and fall on the deck on the port side. I hear, too that he was going overboard because it was very rough weather.

"Q. You thought he was going overboard?

"A. I thought he was gone.

"Q. You thought he was gone?

"A. Yes.

"Q. Did you see him, actually see him fall?

"A. Yes, I see him fall.

"Q. In other words, you were standing on the bridge? Is that what it is called?

"A. I was on the bridge, port side.

"Q. On the port side of the bridge looking forward?

"A. Looking forward.

"Q. You actually saw him as he came out of what is it, the hatch? Is that what they call it?

"A. From the forepeak. When I saw him when he fell—how I could explain? Maybe if I show it to you—he walk

this way (indicating) from there (indicating) to this side [fol. 32] (indicating) and bump like this (indicating) the chains.

"Q. He fell on his left side hitting his head?

"A. Hitting this way (indicating);

"Q. Left and backward hitting—

"A. His head.

"Q. Head, shoulder, ribs on his left side, is that about it?

"A. Yes. This way (indicating).

"Q. For how long a period of time prior to the time this man fell had the weather been rough?

"A. You mean, how rough it was?

"Q. How rough was it and how long was it rough?

"A. It has been rough I should say, from early morning. It lasted maybe one or two days, something like that.

"Q. Just how rough was the weather?

"A. (No response.)

"Q. Is there any way by which we can get some sort of comparison? How high were the seas? How high were the waves?

"A. The boat was rolling heavy.

"Q. Pitching to and fro as well as rolling (indicating)?

"A. The boat was in this motion (indicating).

"Q. Both a side motion roll and a sideways motion?

"A. More rolling. It was a heavy roll.

"Q. And the seas were high, is that right?

"A. I should say there was wind about four to five force on the Beaufort scale.

"Q. Can you translate that for me? I don't understand what you are saying. I understand and then I don't. Translate it for me, Captain.

"A. That might be wind, I should say, something between 25 and 30 miles per hour, something like that. For the sea [fol. 33] it is very hard to define what you want. By heavy roll we mean when they make probably 15-20 degree rolling on the water.

"Q. When this man fell did the boat slip out from under him in the pitching of the boat, did it go out from under him when he fell on the deck, is that about how it happened (indicating)?

"A. No.

Maybe if I show you it will be better. He came from this part (indicating), the forepeak. From the forepeak he go this way (indicating) over the deck to pass astern. When he came about to this point here (indicating) he—

"Q. His foot slipped?

"A. I don't know whether it was the foot or roll or whatever it is, he fall back this way (indicating) with the head and with this (indicating).

"Q. How far had he walked from the forepeak or hatch that you have reference to where he fell? How much of a distance is that?

"A. Might be 15 feet, 20 feet, something like that.

"Q. Was there anybody else with him at that time?

"A. I don't remember. There might be somebody else. I didn't see. I only saw him fall.

"Q. Was there anybody else behind him?

"A. Might be there was.

"Q. You don't recall?

"A. I don't remember.

"Q. Who else was on the bridge with you?

"A. There was on the left side the Second Mate.

"Q. The Second Mate, the man who is outside now?

"A. Yes.

"I was on the bridge for that reason because it was bad weather. For that reason I was staying there.

[fol. 34] "Q. What was the reason that Sentilles went to the forward hatch, in the forward hatch or to the forward portion of the boat, for what purpose?

"A. Something was wrong with the motor the refrigeration motor.

"Q. He went up there to check or repair the refrigeration motor?

"A. Yes.

"Q. When he fell did he remain where he was where he fell or did he slide across the deck, if you recall? I believe you mentioned that you thought he would go overboard.

"A. Yes.

"He slid from that place where he fall (indicating) to the end where is the chains.

"Q. Did he bump into the chains when he slid?

"A. Might be. I don't know in that moment, it happened so very quick.

"Q. In other words, if it wasn't for the chains he probably would have gone overboard?

"A. Might be.

"Mr. Scott: Just a minute.

"I am going to object to that question.

"The Witness: On the boat you have about four inches or five inches high, that is, the gunwales, and he stopped with the legs on it (indicating). Here is the chains (indicating) and the gunwales.

"I think you understand what that is (addressing Mr. Scott). That is the side.

[fol. 35] "Q. Did he get up himself or did somebody help him, pick him up?

"A. I think he moved slowly alone.

"Q. Did anybody help pick him up?

"A. I run down but he was already going this way (indicating).

"Q. He was already walking?

"A. Yes. Before I came down he was moving towards the—

"Q. The ship was still tossing and pitching good?

"A. Oh, yes.

"Q. After he fell did he appear to be injured?

"A. He was complaining about pain in his head (indicating) and pain on this side here (indicating).

"Mr. Kelner: Indicating the back of his ribs on the left side.

"The Witness: I don't remember his left side. He was complaining about pain.

"Q. But you showed me back here (indicating) indicating the left side of his ribs towards the back.

"A. Left and here (indicating).

"Q. So that would be his left side of his head, his left shoulder, his left back and the left rib cage, would that be about it?

"A. The back, I should call that.

"Q. The back? About the middle of the back around the ribs, is that right?

[fol. 36] "A. I couldn't say now, you know whether it was the kidney or something like that.

"Q. Would it be about where his kidney would be?

"A. He was complaining about this side (indicating) and was complaining about the head (indicating).

"Q. Show me exactly where it was. Show it on me.

"A. He was complaining here (indicating on Mr. Kelner).

"Q. The left side of his head.

"A. And then here. (indicating on Mr. Kelner).

"Q. His left rib cage on the posterior side.

"Mr. Kelner: Is that description adequate, Mr. Scott?

"Mr. Scott: You are the one that is testifying, not I.

"Q. Is that about right, from the backbone in the middle of the back shoulders straight across?

"A. I couldn't say just for the minutes.

"Q. But he was complaining about there?

"A. He was complaining about the pain, yes.

"Q. Did anyone else other than yourself and your Second Mate see this man fall?

"A. I don't remember.

"Q. Where was the rest of the crew at this time, if you can recall?

"A. By the ship's business.

"Q. Below decks?

"A. Below decks some of them. Some of them might be sleeping.

"Q. Was this man put to bed after he fell?

[fol. 37] "A. I knew that he went to his cabin, I know he was complaining but how long he was there I don't remember.

"Q. Did he come out of his cabin for the next couple of days or did he stay in his cabin or don't you know?

"A. He was in and out.

"Q. Did he continue to complain all the time that he was aboard ship?

"A. Yes.

"Q. (Continuing) -- until you hit port?

"A. Yes.

"Q. In other words, for two or three days until you reached Miami he continued to complain of the pain?"

"A. Yes, he was complaining about it.

"Q. You didn't radio for medical aid of any kind—

"A. No.

"Q. (Continuing) —did you, Captain?

"A. No.

"Q. Was he given any first aid or any medical aid aboard ship?

"A. We gave what we carry aboard, I should call that emergency treatment.

"Q. What sort of emergency treatment did you give him?

"A. Now if you ask me what medicine it was I don't remember, it is three-four years back.

"Q. Aspirin probably?

"A. No, it was not aspirin, it was something else, I think it was maybe penicillin or something, I don't remember.

"Q. You don't recall?

"A. No.

[fol. 38] "Q. After you reached Miami what happened to this man?

"A. I think he signed off.

"Q. He signed off?

"A. I think.

"Q. He signed off the ship, is that what you mean?

"A. Yes.

"Q. You didn't take him to a doctor or to—

"A. No, I didn't.

"Q. (Continuing) —a hospital?

"A. It might be he went there but I don't know.

"Q. But you don't have any knowledge of it?

"A. No.

"Q. Was he able to walk off the ship or did somebody have to help him off the ship?

"A. He walked.

"Q. He walked?

"A. Yes.

"Q. Still complaining of this trouble all over (indicating)?

"A. Yes. He was always complaining about it."

Mr. Kelner: I will skip page 22, and start at the middle of page 23, with the question, "And what did you do, write them a letter explaining what happened?"

"Q. And what did you do, write them a letter explaining what happened?"

"A. I write them a letter. This is more or less the copy I wrote to them, what I wrote to them.

"Q. You have the copy?"

"A. Yes.

"Q. May I see it, please?"

"A. I will read it.

[fal. 29] "Q. Please.

"A. 'Regarding Motor Benson, Daniel J. Sentilles. Dear sir'—it might be more or less corrected after—

"Q. I understand.

"A. (Continuing) —to the best of my knowledge—"The accident occurred" I think I put something that is scratched here so I am not sure about it—"during the afternoon hours and I saw Mr. Sentilles fall on deck on the forward part port side, that for a moment have thought he has gone overboard. I personally treated Mr. Sentilles and after this have also treated him for heavy cold. In fact, he left the ship pretty sick man. I don't remember the exact date of accident. The fact is he went forward to repair the blower of Hold Number 1 and after tried to cross the deck and return aft when accident occurred. It was very bad weather and I was on bridge with the Second Mate. If the safety line was strung I don't remember."

"(By Mr. Kelner):

"Q. Captain, you stated that after this man fell he developed a cold. Is that right?"

"Mr. Scott: Now, wait a minute. He did not testify to that.

"A. He was complaining after the second day that he was coughing hard and I give him some of these—

"Q. Did he have this cough before he fell?"

"A. No.

"Q. In other words the first time you noticed this cough or his complaint about it was the second day after he fell?

[fol. 40] "Mr. Scott: He said he doesn't remember.

"A. It was that second day or first day, I don't remember.

"Q. It was only after he fell that you noticed this cough?

"A. After he fell he asked me something for this cold and I gave him tablets.

"Q. That was after he fell that he asked you for that?

"A. Yes.

"Q. When you say he had a cold, can you describe that for us? Was that more of a cough, was his nose running, did he have a fever?

"A. Chest. The chest he was complaining.

"Q. He was complaining about pain in his chest?

"A. Yes, sir.

"Q. And he was coughing?

"A. Cough, and I give him these tablets for relief.

"Q. And pain in his chest?

"A. Pain in the chest.

"ROY MALANJAN, called as a witness by the plaintiff, having been first duly sworn, was examined and testified on his oath as follows:

"Q. Did you see this man fall?

"A. Yes, I did.

"Q. Where were you at the time?

"A. On the bridge.

"Q. First of all, do you remember when, what year, what month, what date this accident happened?

[fol. 41] "A. No I don't.

"Q. Would it be approximately in April of 1953?

"A. I think it was in 1953.

"Q. Approximately in the month of April?

"A. Yes.

"Q. Was this in the morning or in the afternoon.

"A. I don't remember.

"Q. Suppose you tell me what happened.

"A. I was on the bridge, it was pretty rough, and Mr. Sentilles was on the boat, he had to go forward down to check the refrigeration. When he come out on the deck I see him falling on the deck right in front of the bridge.

"Q. As I understand then, Mr. Sentilles went forward into the forward part of the boat—

"A. Yes, sir.

"Q. (Continuing) —to fix something wrong with the refrigeration—

"A. Yes, sir.

"Q. (Continuing) —is that correct?

"A. Exactly.

"Q. How long had the weather been rough, heavy?

"A. Heavy? It was all night.

"Q. Before this accident?

"A. Yes.

"Q. In other words—

"A. Before and after. From Haiti, Santa Marta.

"Q. In other words, the weather had been rough, the seas had been rough from Santa Marta?

"A. 36 hours it was rough.

"Q. I don't know anything about sailing or rough weather. Can you tell me just what is rough weather? How rough is it, how high are the waves?

"A. Waves twenty feet high and wash over.

"Q. Washed over the ship. That is what happened to Mr. Sentilles.

[fol. 42] "Q. Is that what happened to Mr. Sentilles?

"A. Yes, sir.

"Q. Did anyone go up to the front part of the ship with Mr. Sentilles at the time he fell?

"A. No.

"Q. He went alone?

"A. He went alone.

"Q. And when he came out of the forward part of the ship or the forward hatch or forecastle, whatever you call it, was he alone?

"A. He was alone.

"Q. And then he started to walk towards the back of the ship?

"A. Yes and he slid, he come down on his back.

"Q. Did the boat fall away from under him and he fell on the deck?

"A. He slipped.

"Q. He slipped?

"A. Yes.

"Q. And down he went?

"A. Down he went.

"Q. On his left side?

"A. On his back. I don't remember.

"Q. Were there any lifelines up at that time?

"A. I can't say for sure. We used to keep them. Whether we had them on at that time or not I don't remember.

"Q. The weather was rough enough for lifelines, wasn't it?

"A. Yes.

"Q. It had been rough for 36 hours before this man fell?

"A. Yes, sir.

"Q. After this man fell did he get up right away or what happened?

[fol. 43] "A. He get up, yes, sir.

"Q. He got up?

"A. Yes.

"Q. And—

"A. He walk back to his room.

"Q. To his cabin?

"A. Yes.

"Q. Did you or the Captain help him get back to his cabin?

"A. No.

"Q. He walked by himself?

"A. Walked himself.

"Q. I forgot to ask you this. After he fell did he stay right where he was or did he slide on the deck?

"A. He got up.

"Q. Did he slide (indicating)?

"A. Yes, sir.

"Q. Let me go back and be sure that you understand the question. He is walking along coming this way and he falls on the deck (indicating).

"A. He fall on the deck.

"Q. Did he stay there right where he fell or did he slide?

"A. He stayed there for a couple of seconds. Then before another one come he get up and walk back.

"Q. Did he slide at all into the chains on the gunwales?

"A. I don't really remember. All I remember is slide and fall on the deck (indicating). What side he hit I don't know. That is with his back.

"Q. Did you see him back in his cabin? Did you go back to his cabin?

"A. I went down maybe after an hour and he was sitting in a chair (indicating). I asked him how he feels and he say, 'I got hit pretty bad.'

[fol. 44] "Q. He got hit pretty bad?

"A. A little bit.

"Mr. Scott: Wait a minute. He didn't say—

"Mr. Kehler: I am trying to understand—

"A. He say he got hit. How bad he don't say.

"Q. How bad he don't say?

"A. No.

"Q. Was he complaining of pain?

"A. Not when I talk to him.

"Q. Did he thereafter develop a cough?

"A. No.

"Q. You understand what I am saying?

"A. Yes, sir.

"I know nothing about that.

"Q. You don't recall?

"A. No.

"Q. Was he given any medical care or medical aid of any kind aboard ship, if you know, after he fell?

"A. On that boat we don't get any medicine.

"Q. There isn't much by way of medical care or medicine?

"A. No; just iodine, bandages, stuff like that. So far as I remember.

"Q. Who makes entries in the log book? Is that the Captain who makes them?

"A. The Captain and Mates.

"Q. Did you make any entries in the log book about this accident?

"A. Yes, sir. The Captain did.

[fol. 45] "Q. The Captain did?

"A. Yes, sir.

"Q. What entries did he make in the log book, if you remember?

"A. Just that Mr. Sentilles fall on the deck on so-and-so date.

"Q. Did he say in the log book about whether or not there were lifelines up?

"A. I don't know. I don't remember.

"Q. How many men were on the crew at this time?

"A. There was four A.B.'s, two officers and the Captain and deck crew.

"Q. All told, how many men?

"A. About 14 men.

"Q. No passengers?

"A. There was no passengers.

"Q. Did anyone else see this man fall besides yourself and the Captain that you know of?

"A. I don't think so.

"Q. You didn't hear of anyone else that saw him fall?

"A. No.

"Q. How many days out to sea were you at the time he fell?

"A. Well, let's see. At the time he fell we were out of Santa Marta, Colombia, 18 hours.

"Q. In other words, you were about 18 hours out of Santa Marta—

"A. Yes.

"Q. (Continuing) —when he fell?

"A. Yes.

"Q. Then how many days to Miami?

"A. About four days, four and a half day to Miami. It was five days before we did get back.

[fol. 46] "Q. Did you notice how Mr. Sentilles felt in the four days after he fell? Did he come out of his cabin?

"A. No. I don't remember. I didn't notice.

"Q. Did you notice whether or not he had any bruises on him of any kind?

"A. No, I didn't.

"Q. Did you notice how Mr. Sentilles looked or how he felt when he left the ship when he got to Miami?

"A. No, I don't remember.

"A. I think a wave hit him and he slipped and fell down (indicating).

"Q. Knocked him off balance?

"A. Knocked him off balance."

Testimony of Captain Richard J. Irving omitted from the printed record pursuant to designations as to printing heretofore copied at page 1.

Testimony of Captain William S. Warner omitted from the printed record pursuant to designations as to printing heretofore copied at page 1.

[fol. 47] Mr. Kelner: This is the testimony of Dr. L. Sidney Charbonnet, Jr., taken in New Orleans.

"Q. What is your full name, Doctor?

"A. L. Sidney Charbonnet, Jr.

"Q. How old are you, Doctor?

"A. Forty-nine.

"Q. Where are your offices?

"A. At 931 Canal Street, Maison Blanch Bldg.

"Q. New Orleans?

"A. New Orleans.

"Q. What is your home address?

"A. 64 Versailles Boulevard.

"Q. Have you been a lifelong resident of New Orleans?

"A. Yes, I have.

"Q. Will you please state the universities from which you hold degrees in medicine?

"A. I received my M.D. degree in 1931 from Tulane University.

"Q. Do you belong to any professional societies?

"A. Yes, I belong to the local Orleans Parish, Louisiana State, American Medical Association and American College of Surgeons. I am certified by the American Board of

Surgery, New Orleans Surgical, as well as Louisiana Surgical Associations and Southeastern Surgical Congress.

"Q. I think you have been practicing continuously in New Orleans since your graduation from a medical school, with the exception of your absence during World War II, is that correct?

"A. That's right, during four years of it.

"Q. Where did you serve during those years?

"A. I saw service in the Mediterranean Theater of Operations, Africa and Italy.

[fol. 48] "Q. With the Army or Navy?

"A. Army.

"Q. And what rank did you hold at discharge?

"A. Lieutenant-Colonel.

"Q. Doctor, this deposition is being taken in connection with a claim by one Daniel J. Sentilles against Inter-Caribbean Shipping Corporation. Do you know Daniel J. Sentilles?

"A. Yes, I do.

"Q. When is the first time that you saw him professionally?

"A. In 1935 at Charity Hospital.

"Q. Have you seen him off and on since that time?

"A. Yes, sir.

"Q. Doctor, did you treat him prior to the month of April of 1953 or, say, immediately prior to that time?

"A. I saw him—the last time I saw him was in February of 1953—February 8, I think it was—I can give you the exact date—February 18, 1953.

"Q. And how long had he been ill in connection with the purposes for which you saw him on February 18, 1953?

"A. Prior to that time I had seen him in October of '52 and on February 18, 1953. He visited the office for a routine check. At that time he had had a little mild intestinal upset.

"Q. And prior to October of 1952, when did you see him?

"A. Well, I saw him in September of that year and in August and July of '52—I saw him from May of '52, May and July, August, September and October.

"Q. Now, for what purpose did you treat him in May of 1952?

"A. It was for disturbance of the sexual glands, impotency.

[fol. 49] "Q. And is that the only thing you treated him for at time?

"A. Well, that year, yes; that's what I treated him for at that time. He was sent to Dr. John Menville for that particular condition; that's what he visited me for in May.

"Q. Did you examine him in May of 1952?

"A. Yes.

"Q. And what, if anything, in the pathological line did you discover at that time?

"A. I have a note of that. He was admitted to Hotel Dieu for study, including a gall bladder study. We were studying for possible common duct stones which he had had previously and we had a pyelogram, barium enema and chest x-ray. That was in May of 1952 and the note that I made subsequently was that complete examination failed to reveal any abnormality of the G.I. tract and this man, as you know, is a diabetic and he was checked at that time in regards to his diet and his insulin need.

"Q. How far back did his diabetic condition go?

"A. His diabetic condition was recognized, I think right after the war, when I saw him in 1945. Let me check that and see. I believe that's correct. I don't believe we found any diabetes on him before that. On October 28 of 1945, I saw him and admitted him to Hotel Dieu at that time and in my note I stated—because this was in 1945 and I had just resumed practice—and at the bottom of that is a note which was a hospital resume, that eighteen months ago he had seen a doctor for polyuria, which is increased frequency of urination and drinking, and sugar was found in his urine. This doctor gave him some tablets.

"Q. Who was that doctor?

[fol. 50] "A. I don't know; it was during the Service; I think it was in another country. Two months ago he was aware of the fact that the sugar in the urine—

"Q. Doctor, when you say two months ago, you mean two months prior to May of 1952?

"A. He recognized it or he probably was taught by this doctor, I think it was somewhere in South America—to test his urine and he said it recurred at that time.

"Q. These records from which you are reading, are those your personal records?

"A. Those are hospital records.

"Q. From Hotel Dieu?

"A. Yes, they are under my personal file there but there are older records.

"Q. May I see them, please?

"A. Yes (presenting).

"Mr. Sarpy: These records of the Hotel Dieu are marked and identified by General No. U 153F8263 and ZSS 333, and also bear the same hospital number. These numbers are for identification of these documents which will be identified by the custodian of records of the Hotel Dieu.

"Q. Now, Doctor, in the course of your seeing this man between October of 1945 and May of 1952, what, if anything, did you discover with regard to tuberculosis?

"A. Up until the time that he returned from New York with this potential diagnosis, I have never suspected tuberculosis. That was in May, the early part of May of 1953, I had never suspected tuberculosis before that.

[fol. 51] "Q. Doctor, what is your specialty, if any, in the field of medicine?

"A. General surgery.

"Q. What, if any, dealings do you have with tuberculosis?

"A. Well, intestinal tuberculosis cases, we deal with and I have already done some resections—surgical resections for tuberculosis, various palliative measures, phrenic nerve and thorocoplasty of collapsing of the chest wall. In other words, I have taken care of the surgical side of tuberculosis in a limited way; I haven't had a good deal of it.

"Q. How about pulmonary tuberculosis?

"A. Pulmonary tuberculosis, from the surgical standpoint dealing with, as I mentioned, the phrenic nerve and on just a few occasions I have done the collapsing of the chest wall on the lung and injected air.

"Q. Is it fair to say, Doctor, that the treatment that you give tubercular patients is principally in the line of surgery?

"A. In the line of surgery and usually under an internist who is looking on. They usually request surgery procedures on these patients and that's my only association profes-

sionally in my special field that I deal with tuberculosis itself.

"Q. And at the time that you did discover tubercular condition in May of 1953, will you state—

"Mr. Kelton: Note an objection to the form of the question since it calls for an assumption. The doctor has not stated that he found tuberculosis.

[fol. 52] "Q. Will you state what, if anything, you found in relation to tuberculosis in Mr. Sentilles in May of 1953?

"A. This man was returned—he returned from New York with a note from a doctor—Dr. Fischbach—Dr. Karl Fischback, M.D. 870 Seventh Avenue, New York on April 30, 1953. He stated, 'I examined Mr. Daniel Sentilles this morning—' do you want this?

"Q. Go ahead and read what you have in your record.

"A. This is a letter from him: 'I examined Mr. Daniel Sentilles this morning because of persistent hoarseness this week. This symptom has been recurring for past 6-8 months period. Examination reveals a circumscribed walled off area of density with central translucency and fluid level in left lower lobe—'

"A. I admitted him to Hotel Dieu and I called Dr. Marion LeDoux in consultation and requested that he would manage this case.

"Q. And did he manage the case?

"A. He took over the diagnostic and therapeutic part. I think the records would indicate that.

"Q. And what diagnosis was made?

"Mr. Kelner: We object to that unless the question refers to what diagnosis this doctor made.

"Q. Did you make any diagnosis in connection with the matter, Doctor?

"A. I did not make a specific diagnosis. I was relying upon the man who I felt was more in a position to make a specific diagnosis.

"Q. Do you know how long the patient might have had diabetes and or did have diabetes?

[fol. 53] "A. It was recognized apparently during the war. I would say eighteen months prior to October of 1945.

That would be somewhere in the middle of 1944 or early 1944, according to the history."

(Quoting from deposition continues on page 16 to page 25.)

"Q. Doctor, if I understand your testimony correctly, you examined this patient in February 1953—February 18, 1953—which would be roughly two months prior to the date of this accident, is that correct?

"A. Yes, sir. I saw him but he was not admitted to the hospital at that time. He made an office visit on February 18, 1953.

"Q. Was he in good health at that time?

"A. He returned for a check on his diabetes and the thing that brought him to see me was that he had had some dysentery and that was the precipitating factor, so to speak, that brought him to the office, but we checked his diabetes and the record indicates here that diabetic state—I have no statement here in regard to his diabetes.

"Q. Doctor, we are not primarily concerned with the diabetes; we are concerned with his chest difficulties.

"A. I have no note at that time on the record of any chest condition.

"Q. So apparently then on your examination of February 18, 1953, two months prior to the time of this accident, you found no chest difficulties of any kind?

"A. No, sir.

"Q. Did you take any x-rays of him at that time or any fluoroscope?

[fol. 54] "A. No, sir.

"Q. Then I believe you stated that chest x-rays were made in May of '52, is that correct?

"A. Yes, I believe that's the time. It was around that time—I will give the exact date of that x-ray—on May 6, 1952.

"Q. And at that time, was there any evidence of tuberculosis of any kind?

"A. The report did not strike me and the roentologist—they are x-ray men—did not report anything of tuberculosis.

"Q. So that apparently in all of the examinations that you have had, prior to May of 1953, you found no evidence to suspect tuberculosis?

"Mr. Sarpy: We object to this question as being leading, counsel. This is a deposition under discovery and this doctor is the doctor of your own client.

"Mr. Kelner: I don't think this subject can be led, however, I will rephrase my question.

"Q. Doctor, I believe you stated that you examined this patient by chest x-ray in May of 1952 at the Hotel Dieu?

"A. Yes.

"Q. And July, '52, in August of '52, September of '52, October of '52 and February 18, 1953. Under any of these examinations, did you find any evidence of tuberculosis of any kind?

"A. No, sir.

"Q. Did you have reason or cause to suspect tuberculosis in any way prior to the time that he returned from New York in May of 1953?

[fol. 55] "A. That's right.

"Q. Prior to that time, did you have any such cause to suspect tuberculosis?

"A. No, I didn't. I thought I had answered that.

"Q. Doctor, in any of the questions that I ask you, questions asking for the expression of an opinion; if you are able to express an opinion with reasonable medical probability please do so. Otherwise, refrain from answering the question. Rather than repeating that basis for opinion at the beginning of each question—do you understand what I mean?

"A. Repeat that.

"Q. I am going to ask you some questions which may require opinions. If you are able to answer the questions that I ask you with reference to your opinions with reasonable medical probability, do so. I am mentioning that at this time to prevent my having to repeat 'with reasonable medical probability' as a preface to each of the questions that I ask you.

"A. That's right.

"Q. You understand what I state now?

"A. Yes.

"Q. Is it not true, Doctor, that most of us have at one time or another inactive tuberculosis bacilli in our lungs, at one time or another in the course of our lives?

"A. I believe that--can I answer that this way--I believe that many times we are in contact with the organism and the disease is not contracted.

"Q. Are the lungs a fertile field for tuberculosis, infiltration?

"A. The lungs are the most common area involved.

"Q. Can a sudden blow to the chest cause the spread of tuberculosis bacilli upon sensitized lung tissue?

[fol. 56] "A. I wouldn't know that.

"Q. Now, Doctor, based upon your prior examinations of this patient, prior to May of 1953, and based upon your examinations of the patient subsequent to May of 1953, do you have an opinion as to whether or not this man did, or did not have tuberculosis?

"A. I would like to say that I would go by the opinion of the consultant that I called in, whom I have complete confidence in and I would be aligned to his concept.

"Q. In other words, you have no separate opinion?

"A. I have no separate opinion.

"Mr. Sarpy: That is Dr. LeDoux you are referring to?

"The Witness: Dr. Marion LeDoux."

"Q. Doctor, can a blow of the chest, inhalation of water, lowered resistance of the chest by means of that blow with lack of aeration, the chilling of the body, can these factors cause an aggravation of pre-existing, dormant, fibrotic tuberculosis?

"Mr. Sarpy: We object to the form of that question on the ground that it's entirely too complicated. This doctor does not hold himself out to be an expert in the tubercular field. He has repeated that he referred the case to Dr. LeDoux and we don't feel that the question is fair, under the circumstances.

"Q. Are you able to answer that question, Doctor, or was it too complicated? I don't want to be unfair in any way. [fol. 57] If you are unable to answer, I will withdraw the question.

"A. I would say this in answer to that question. Certainly trauma can lower tissue resistance. I do not know and I cannot ever recall of knowing of any case of tuberculosis. I am not in that particular line. I do not know of any cases that were produced by trauma but trauma can lower the resistance of tissue in the lungs. That's the farthest I would go on that.

"Q. My question was not aimed at the causation of tuberculosis but, rather, the activation of latent focus of tuberculosis. Can a blow to the chest—a severe blow to the chest—aggravate the latent focus or can it activate a latent focus?

"Mr. Sarpy: Same objection.

"A. The reason I mentioned it that way, I do not know, in regards to tuberculosis, I do know that such a thing can lower tissue resistance of the lungs. Now, whether or not the germ could get a foothold, say, I believe that we all have to form opinions on what we have experienced or what we have read in that regard, and I do not honestly know of any case that was aggravated by trauma.

"Q. You, of course, will leave that to the expert in the field, Dr. LeDoux?

"A. I would prefer leaving it to him.

"Q. He has more experience in that regard than you have. I assume, is that correct?

"A. That's right.

"Q. Now, when you examined this patient, did you find that he had a lung abscess, Doctor?

[Vol. 58] "A. Again I state that the letter from Dr. Fischbach indicated that a cavity was found and I referred the case to Dr. LeDoux for evaluation.

"Q. In other words, you did not make any independent examination?

"A. I didn't make any independent examination or diagnosis.

"Q. Doctor, do you know when Mr. Sentilles was able to resume his active duties after his confinement to the Marine Hospital?

"A. I know no more that what was in this statement here. I think that everyone has a copy of that letter, that he

was discharged with no work for 240 days and I did not see Mr. Sentilles during that interval at all.

"Q. He was under the care of the doctors at the Marine Hospital?

"A. That's right and I presume Dr. LeDoux—perhaps, I don't know, but I know that he had been at the Marine Hospital and I did not see Dan Sentilles again until May of 1955 in my office.

"Q. Doctor, what was your charge for your services that you rendered to Mr. Sentilles, starting in May of '53, for this lung difficulty that he had?

"A. I do not recall but I believe I can check that. I don't believe I sent him any at that time. I think it was just for one visit or something of that sort.

"Q. Doctor, I show you this duplicate of a bill in the sum of \$85.00, dated June 5, 1953, for \$85.00, and I ask you whether or not that is the bill that you rendered to this patient for your services subsequent to May of 1953?

"A. This was not—this was June 5, 1953; this was not—it could hardly be a bill for that time. I know this bill was paid and sent on the 5th of June, 1953 and that was an old bill.

[Vol. 59] "Q. That was an old account?

"A. That was an old account.

"Q. How much did you charge him for examinations and treatment?

"A. I re-state, I don't believe I made any. I have interpreted that but I am sure that that is—

"Q. In other words, you just saw him once? You saw that he had consultation and you stepped out?

"A. Yes, and, as you see, a bill of that size—

"Q. That's what we are trying to determine.

"A. I am saying that I didn't check that and I know that if it was anything, it was one or two visits of something of that kind but this family, I have been treating them for years and they carry along on my books constantly.

"Q. Can you separate it then and break it down for us? Was there any charge of any kind for the visits?

"A. As I told you, I'd have to look it up. I was under the impression, because of his difficulties at that time, I was under the impression I made no charges but I will have to

check that because I did refer the case to Dr. LeDoux. I think this represents a payment, especially if it's on the 5th of June. He was just in the hospital a couple of days. I am sure that that bill wasn't one for when he was in the hospital though I am a little confused on that. I was thinking this was May 5, this collapse—I have to change it. I am not going to say that this didn't represent the charges at the time of seeing him but it's not for—I really am a little confused. If you give me a while, I could possibly give you a statement in regards to that from the office. I don't believe that he had any such charges at that time.

[fol. 60] "Q. Can you tell us how many times you saw this patient before he was admitted to the hospital on May 14? I believe you stated you saw him on, roughly on May 1 of 1953 and that he was admitted to the hospital?

"A. Admitted to the hospital directly and then, of course, I saw the man as long as he was at the hospital. He was a patient of mine and even though another doctor was taking care of him and running the course of the thing I would pay him visits regularly and see him practically every day while he was at the hospital.

"Q. And you didn't charge for those visits?

"A. As I say, I don't know. It may be that I did but I was under the impression when I saw June 5—I knew if it was May 5 that it wouldn't be any such charge."

Mr. Scott: Haven't we admitted these bills?

Mr. Kelner: No, sir.

Mr. Scott: We admit the charge was fair and reasonable.

The Court: What was it?

Mr. Kelner: \$85.00.

The Court: You admit it was fair and reasonable?

[fol. 61] Mr. Scott: Yes.

The Court: You don't admit it was necessary?

Mr. Scott: No.

Mr. Kelner: You may continue reading starting from the bottom of page 27.

Mr. Scott: May it please the Court, there were other portions of this deposition omitted, which deal with some previous medical history. I think if Dr. London is going to have the benefit of listening to this testimony—

The Court: He can use any part of that deposition. All right, you may proceed.

Mr. Scott: May it please the Court, there is an objection in here to a letter which Mr. Sentilles brought with him from Dr. Fischbach in New York. We have taken his deposition, and we believe that under those circumstances that letter is now admissible.

(Discussion off the record.)

The Court: I don't think the letter itself is admissible. It would be hearsay. But the doctor that wrote the letter, his [fol. 62] deposition may be used to bring out that particular matter. In other words, we have his deposition, which is better than his letter.

"Q. Did you perform any surgery on this subject, Doctor?

"A. Several times during his life.

"Q. Will you state what those times were?

"A. Well, it really goes back to 1935.

"Q. What did you do at that time?

"A. At that time, this man had been operated by the senior resident at Charity Hospital. The surgery done was for ruptured appendix and subsequently he had a very critical course.

"Q. What was that?

"A. He developed peritonitis. He had--Now I have to rely a good deal on memory because I have not the hospital records in hand. I did plan to review that this morning but I didn't get there in time. He had a hepatitis at that time, severely jaundiced and we considered him critical. I don't recall but I think he had a pneumonitis.

"Q. What is that?

"A. That's comparable to surgical or bed pneumonia but at that time we called it bronchial pneumonia. As I remember it--and I am saying again this is from memory--we thought perhaps that it was a septic pneumonia that was causing the jaundice.

"Q. When was this, Doctor?

"A. In 1935. Dr. Hoffpauer was the resident. He is a brother of the Judge."

"Q. What was next, Doctor?

"A. I have a record of January 4, 1941 stating that I recall this is my note at that time—this patient had severe illness following ruptured appendix about six years ago. [fol. 63] Since then, pernioplasty was done with good results. The hernioplasty was probably done also at Charity."

"Q. Now, subsequent to January 4, 1941.

"A. In March of 1942—March 6, 1942—I recognized in 1942 that this man had—or I suspected—I have a note here that patient probably has gallstones. Now, that was just prior to going into the Service and the next time I saw him—that was in March and at that time he did have two little—this is going into very much detail—he had two little lesions in his mouth that was diagnosed as small hemangiomas. These were little red vascular tumors but they concerned him and I think one opened and bled so we removed those two little lesions. That was in March of 1942.

"Q. These are your personal records?

"A. Yes, personal records that I have on it. That's my personal records and opinion."

"Q. Doctor, do you have any way of knowing the cause of his tubercular condition in May of 1953?"

Mr. Kelner: We objected to that.

The Court: I assume it would be connected up with the other doctor. Subject to a motion to strike, I will overrule the objection.

"Q. I think he has indicated that a tubercular condition was discovered upon his return to New Orleans from New York, is that correct, Doctor? Did you come to the conclusion that he had a tubercular condition upon his return to New Orleans from New York in May of 1953?

[fol. 64] "Q. I think he has indicated that a tubercular condition was discovered upon his return to New Orleans from New York, is that correct, Doctor? Did you come to the conclusion that he had a tubercular condition upon his return to New Orleans from New York in May of 1953?

"A. I think I was careful to say that a cavity was discovered and that he was admitted to Hotel Dieu to determine the cause of this. I used the term potential, is what I said, for the possibility of tuberculosis.

"Q. Was that cause discovered?

"Mr. Kelner: You mean by the doctor?

"Mr. Sarpy: The doctor has testified that he was put into Hotel Dieu for the purpose of discovering the cause of the cavity.

"Mr. Kelner: Unless the doctor testified as to what he discovered, we will object to it as hearsay.

"Q. Did you make any discovery of your own, Doctor?

"A. I admitted the patient to the hospital and I thought I had explained that. I asked Dr. Marion LeDoux to take over completely.

"Q. Therefore, you made no diagnosis of your own?

"A. I made no specific diagnosis of my own."

Mr. Scott: We would like to start at page 28, at the bottom.

[fol. 65] "Q. No, I am talking about the times that you saw him.

"A. That was in October of 1945. Now, in '46 I have a note that he had recovered well and then I saw him again in 1948. He had had, as you recall, a hernia repaired on one side and he had at this time a hernia on the right side. That hernia was bothering him and he planned to have it repaired and this hernia was repaired on July 6, 1950—that was a recurrent right hernia—that was a recurrent hernia on that side because I think he still has a little weakness on the other side. This was recurrent on the right side and the recurrent hernia was repaired July 6, 1950. I saw him on March 26 of 1951 for impotency. His complaint then was—chief complaint was impotency, fatigue and depression. We found again that he was not stabilized and as far as his diabetic state was concerned, I think I can justly say that this man was difficult to stabilize because of his own fault, in a way. He was not one to follow closely. We saw him in July of '51 and then, as was mentioned, from May of '52, right on through. At that time he was admitted to the hospital for that survey of 1952.

"Q. In July of 1951, what did you find?

"A. He had a mild prostatitis and massage was done at that time. He was still not potent and we changed him

from the regular type of insulin to protamine insulin to maintain the stabilization of his diabetic state. Then I think in May, '52 is when he was admitted to the hospital and there was a lesion on his leg that had given him some difficulties, in his words, "that would never heal," and while he was in the hospital, this little piece of tissue was excised. [fol. 66] The report at that time was, I think, a fibroma.

"Q. Then you go into 1953 that you have already testified about?

"A. That's right.

"Mr. Sarpy: That's all.

Re-direct examination.

By Mr. Kelner:

• "Q. May I see this last note on your personal records, Doctor? (examining record) I note your personal note here dated February 21, 1957—

"A. I said that I made notes on that record that I sometimes put down for my own information that I would not like to qualify as knowing exactly.

"Q. All right, sir. Permit me to read to you from your personal notes a portion thereof dated February 21, 1957 and when I finish reading this into the record, I will ask you if you can explain this portion, please, sir. 'Repeated examinations for positive acid-fast tuberculosis were negative except on one occasion, one brought to LSU Medical School and that is still questionable.'

"A. That's why I made that statement. I was wrong at that point. I had found out subsequently that the cultures that are reported on the record are positive.

"Q. Therefore, we feel that this may represent either a bronchial pneumonic process or hematoma that broke down, with secondary infection. To substantiate this the patient made a relatively rapid recovery with no recurrence, with a negative sputum. I believe tuberculosis in [fol. 67] this case is definitely questionable.' Is there anything that you wish to add or to explain concerning that, Doctor?

"A. That's why I asked that this would not be incorporated.

"Mr. Sarpy: We will object to the doctor's objection to any request on—

"Mr. Kelner: I didn't know that was the portion.

"A. That was the part that I feel I expressed myself to myself there but I didn't put this on the record for publication.

"Mr. Sarpy: We move that this entire line of questioning and the answers be stricken physically from the record.

"A. The reason I said that, Mr. Kelner, was because if I made that statement I'd have to naturally substantiate it and, as you see there—

"Q. This was written prior to the time—

"Mr. Sarpy: Let him finish what he is saying.

"A. At that time I was not familiar with the fact that there were positive cultures obtained and the diagnosis—I didn't know they had found positive organism. I was under the impression that it was still not too definitely proven.

[fol. 68] Thereupon, SEYMOUR B. LONDON, was called as a witness on behalf of the Plaintiff, and having first been duly sworn, was examined, and testified as follows:

Direct examination.

By Mr. Kelner:

Q. Please state your name and occupation?

A. Seymour B. London, M.D. I am a physician.

Q. Where do you maintain your office?

A. 1085, Dade Boulevard, Miami Beach, Florida.

Q. Are you duly licensed to practice your profession in the State of Florida?

A. I am.

Q. When were you so licensed?

A. 1941.

Q. Where did you receive your medical schooling, education and training?

[fol. 69] A. I was graduated from Harvard Medical School in 1940. Interned at the Beth Israel Hospital in Boston for 18 months, followed by a residency at Bellevue Hospital in pulmonary disease.

Q. That's a chest disease?

A. Yes, for one year, and a subsequent residency in cardio pulmonary research for a period of approximately 9 months; followed by three years in the Service, at which time I served in the capacity of Chief of the Chest Division of a Hospital.

Q. In other words, all of your specialized training has been in the field of the chest. Is that correct?

A. Correct.

Q. Have you had any experience with tuberculosis, Doctor?

A. Yes. I am engaged in the sub-specialty of cardio pulmonary disease, and I deal extensively with diseases of the chest, which includes, of course, tuberculosis. I am a specialist in internal medicine and have been certified by the American Board of Internal Medicine.

Q. Wait a minute. You said, "Certified". Just what does that mean, "certified as a specialist"?

A. That is a process whereby certain criteria are established for a physician which enables him to be recognized by his colleagues as a teacher, and a person who is primarily interested in a certain field.

Q. Is that an honorary thing, or do you have to take examinations?

A. Yes, you take actual examinations, and certain credentials have to be established.

Q. Is that done locally or by the American Medical Association?

A. Through the auspices of the American Medical Association and College of Physicians.

[fol. 70] Q. In other words, would it be a correct statement that you have been certified by your fellow Doctors as a specialist in that field?

A. That would be correct.

Q. Are you familiar with any - rather, affiliated with any Medical organizations?

A. I am a member of the County Medical Association, The State Medical Association, the American Medical Association. A member of several of the other Associations associated with diseases of the heart and lungs, the American Trudo Association, and the American Heart Association.

Q. Are you affiliated with any Hospital locally, and if so, in what capacity?

A. I am Assistant Medical Professor of Medicine at the University of Miami Medical School, and on the attending staff of Jackson Memorial Hospital.

Q. Do you teach at the University of Miami Medical School?

A. Yes.

Q. What subjects?

A. Internal medicine. I am Chief of the Chest Section at the Mt. Sinai Hospital, and on the attending staff of the Mt. Sinai Hospital. I am a consultant in diseases of the chest for the Veterans' Administration, the Regional Office. I am attending specialist at the Veterans' Administration Hospital in Coral Gables, and senior attending physician at the National Childrens' Cardiac Home.

Q. That's enough. Now, Doctor, I gave you the depositions of Dr. Charbonnet and Dr. LeDoux, and Dr. Jacobs. Those depositions will be read after you have testified. Have you read those depositions?

A. I have.

[fol. 71] Q. Now the matters contained in the depositions and in this testimony is of a technical nature, and it is for that reason that I wish to ask you a few questions. Have you ever examined or treated Mr. Sentilles?

A. No, I haven't.

Q. In other words, you are here solely as an expert witness to answer questions?

A. That is correct.

Q. Now, Doctor, with reference to tuberculosis. Can tuberculosis be inactive in a person without a person even knowing about it?

A. Yes, it very often is inactive.

Q. Assume, Doctor, that chest X-rays were made, one taken in 1950, one taken in May of 1952, just as you have

read and you have heard from Dr. Charbonnet's testimony, and that Dr. Charbonnet, in the examination of those X-rays found no tuberculosis, and that he had no reason to suspect tuberculosis until this man falls in the middle of April, and got sudden symptoms and congestion of the chest, a fluid level thereafter develops rapidly; and that subsequent chest X-rays and diagnosis determines that a tubercular condition did exist. Could that man's fall on board a ship in April, 1953, the middle of April, 1953, have activated a dormant tubercular condition?

Mr. Beckham: Excuse me, Doctor. I would like to enter an objection, Your Honor, on the grounds that the Doctor has testified that he has read the depositions, not only of Dr. Charbonnet, but those of Dr. Jacobs and Dr. LeDoux, and I respectfully suggest that the deposition testimony of [fol. 72] Dr. LeDoux does not coincide with the hypothetical facts regarding what the X-rays revealed.

The Court: I will sustain the objection. Why don't you ask the Doctor a simple question, that if a man had dormant tuberculosis, and suddenly falls, such a falling on his back, or had a severe fall, and also inhales some sea water at the same time, and was taken with a bad cold and chest cold,—whether under those conditions, from a medical standpoint, would there be any medical reason to believe that such a fall might have brought to life a dormant tubercular condition.—Something of that sort.

By Mr. Kerner:

Q. Will you answer the Judge's question, and save me the difficulty of asking?

A. I believe that a fall that he described might reasonably aggravate any bronchial condition.

Q. When X-rays are taken and there is a little speck on the X-rays, is it a common thing for a dormant tubercular condition to be over-looked?

A. If one is not suspected of a disease of the lung; then the chance of over-looking this condition is more common than if one is on the look-out, or in retrospect—

Q. You say, "in retrospect"; just how is retrospect used as a tool in the medical profession?

A. Well, in X-rays, we are dealing at the most with shadows on a sensitive film of emulsion, and these shadows can produce certain changes which may be indicative of tuberculosis in one instance, and a similar shadow may indicate an entirely different disease in another instance; [fol. 73] and in retrospect, if one knows that this patient had tuberculosis we can look back and say, it probably was tuberculosis at that time. That if this patient never develops tuberculosis, we might look back and say, "Well, that's just a little shadow, and we don't know the explanation of it."

Q. In other words, like all the rest of us, looking backwards is a lot easier than looking forward?

A. That's right.

Q. Now if the mark or the spot on the X-ray was so small as to be over-looked by a chest surgeon, as this man was, would that not be an indication that the tubercular fibrotic lesions, healed scar of the tuberculosis, would be small indeed?

Mr. Beckham: Your Honor, I think that's an improper question.

The Court: I think you are going into the realm of conjecture. Is it not true that in most adults there are some spots shown in X-rays?

The Witness: I think that in a large percentage of adults, in any event, there are residuals of previous infections that may be apparent on examination, and usually are ignored in interpretation as being of any significance, and not reported, because the radiologist feels that it is not an active process, and it is not worth while mentioning.

The Court: May be old or dormant?

[fol. 74] The Witness: Yes, or an inactive process.

By Mr. Kehner:

Q. And a sudden blow, plus inhaling of water, being washed over by a cold wave of water, restrictions of the chest so that there is aeration, being confined to bed for several days, could all of these various factors be a competent producing cause for the activation of a latent dormant tubercular condition?

Mr. Beckham: I object.

The Court: I will sustain the objection, because being confined to bed—he has already answered that question. He said any blow, shock, might, from a medical standpoint, being a contributing cause to bring to life a dormant condition.

By Mr. Kelner:

Q. What conclusions would you draw from the fact that the man felt well up until the time he had the fall, and that thereafter he developed this pain in the chest that followed two to three days later, by congestion in the chest?

Mr. Beckham: I object.

The Court: I sustain the objection on the ground that the evidence doesn't indicate that he was well, or he felt unwell. The evidence indicates that this man was examined [fol. 75] by physicians at a time not very far removed from the happening of this accident. They found nothing in his chest, or they discovered nothing, and after the accident they found lesions in the chest, and later, tuberculosis. Is that correct?

Mr. Kelner: Yes.

By Mr. Kelner:

Q. Giving the exact dates, February 18, 1953, as the examination by the Doctor, the middle of April as the fall, and May the 1st as the diagnosis of the full-blown tubercular condition. What conclusions would you draw from that?

Mr. Beckham: I think that is too general a question.

The Court: I think so too.

Mr. Beckham: What conclusions are we looking for?

The Court: I think he has answered everything he can answer.

By Mr. Kelner:

Q. Based upon your having read these depositions of these treating Doctors, the deposition of Dr. Jacobs and Dr. LeDoux, do you have an opinion, based upon the informa-

tion contained therein, and the facts presented thereby, as to whether or not this man's fall aggravated his pre-[fol. 76] existing latent tubercular condition?

A. From the information that I was able to glean from the testimony, it would seem that after the fall he had a sudden worsening of his general feeling of well-being, and I would have to assume at this point that this was associated with the finding of the caviterior region by X-ray approximately two weeks later at the time of the fall, and that these are not only related temporarily, but cause and effect. I would assume that this exposure, such as it was, to the inclement weather, and the trauma to the chest, probably played a role in making him feel worse at this time, and probably aggravated his condition.

Mr. Kelner: No further questions. You may inquire.

Cross examination.

By Mr. Beckham:

Q. Doctor, you stated from what you read in these depositions, it is your opinion that the man had a sudden worsening of condition. Is that correct?

A. Yes, that was my opinion.

Q. You did read Dr. LeDoux's deposition. Is that right?

A. Yes, I did.

Q. Is it not true that Dr. LeDoux stated that there was no indication whatsoever that the disease had suddenly become acute?

Mr. Kelner: If the Court please, the deposition will be read in evidence.

[fol. 77] Mr. Beckham: That's the problem that we brought up, Your Honor, when he brought the Doctor out of turn.

The Court: It will be stricken. I will strike all of this testimony. We will assume, for the sake of brevity with this witness, so you won't have to call him back, unless counsel objects, that we may use these depositions for the purpose of cross examination.

Mr. Beckham: He has stated he read this deposition.

The Court: I have ruled in your favor.

By Mr. Beckham:

Q. Is not that true, that there was nothing in the deposition to indicate that the man suddenly had a worsening, or that the disease had suddenly become acute?

A. I recall the deposition, having read it briefly, but it was my impression that this man's condition did worsen prior to the time of going to Dr. LeDoux,—prior to the time of his attending the physician, his condition did worsen; whether it was a two week period of time or three week period, or a month, I do not believe that his condition was stable over a period of several months. That was not my impression from reading the testimony.

The Court: I believe the Doctor doesn't understand the question. Supposing you show him the quotation that you [fol. 78] are talking about, and read it, and let the question be repeated so we all understand.

Mr. Kelner: I will offer that deposition in evidence.

The Court: Let's offer the page.

Mr. Kelner: Page 26.

The Court: That will be admitted.

(Thereupon page 26 of the deposition of Dr. LeDoux was marked in evidence as Plaintiff's Exhibit 3.)

Mr. Beckham: I am going to read from the bottom of page 25, and the answer to this question with which we are concerned now, "Was there any sudden change as a result of any information that you have, in that two week period, from April 15, 1953, to May 1, 1953,—anything dramatic, anything unusual?" Mr. Kelner says: "You mean any information including any information that I gave?" Our attorney states: "From the information from the records and as told to him by the patient." And the answer was: "May I check something please? I have no information in my records at all whereby the disease suddenly became acute. Is that what you mean?" Do you recall reading that?

A. Yes, I do.

[fol. 79] Q. Do you still draw the conclusion from the reading of these depositions that there was a sudden worsening of the Plaintiff's condition?

A. According to this there is no evidence of that nature.

Q. I pointed this out to you. I want to be fair. But I am asking you the same question that Mr. Kelner asked you.

Mr. Kelner: Counsel has stated he wants to be fair, and yet he is not fair, because he takes a small portion in which one Doctor says he has no history, and the other Doctors said they ~~do~~ have a history of a sudden change. Counsel is attempting to pull one small paragraph out of context from the deposition.

The Court: Most times counsel do that. They take a paragraph they think is favorable to their side.

Mr. Beckham: I was going to tell the Doctor I am still asking him not in regard to this particular deposition, but I am still asking him from the reading of all the depositions of Dr. Charbonnet and Dr. Jacobs and Dr. LeDoux. Is it still your testimony that there was a sudden worsening or your conclusion, based upon those depositions, that there was a sudden worsening of the Plaintiff's condition?

A. My conclusions were based on perhaps my own medical interpretation of the natural progress of the disease. We do know that this man was able apparently to indulge in the duties, or whatever he was able to do as a seaman.—

[fol. 80] Mr. Beckham: I hate to interrupt this, but I think you can answer my question with one word, and I will give you an opportunity to explain.

The Court: Supposing you say yes, or no. He asked you if you still felt from all these depositions that his condition rapidly worsened between the injury time, and the time that Dr. LeDoux examined him, which was a matter of weeks, I understand.

Mr. Beckham: It covered April 15th to the 1st of May.

The Court: You can answer that, and then explain it, if you will, in any way, shape or form.

The Witness: I can't answer the April 15th date. I can't honestly put a date from the testimony I read that April 15 marked the date of any change in the situation,—marked the beginning, or was in any way indicative that a change occurred on that date.

By Mr. Beckham:

Q. Your testimony is, sir, that you cannot say that?

A. That's right.

Q. Is there anything else that you would like to say?

A. Yes. I can answer this question. The only way that it could be answered, that this man who had a cavity in his lung by X-ray, most likely would not have been able [fol. 81] to indulge in any of his usual occupations for any length of time with this cavity; and I would say that a two week period would be an ample period of time for him to become critically ill without medical attention. That's why I feel that the period of two weeks is a good medical probability. However, I don't see any evidence in the testimony.

Q. I am glad you brought that out, Doctor. You were not given the depositions, the deposition of Dr. Taquino, were you?

A. No, I wasn't.

Q. Likewise you were not given the Hospital records covering the Plaintiff, were you, sir?

A. No.

Q. Neither were you given the deposition of Dr. Fischbach. Isn't that correct?

Mr. Kelner: If the Court please, I have never seen the deposition of Dr. Fischbach. Dr. Taquino's deposition merely states he performed a bronchoscopy without having any knowledge of what the diagnosis was, so it is an attempt to cross examine the Doctor,—so this attempt to cross examine the Doctor I feel is an unfair attempt to try to have the Doctor say, you didn't see this.

The Court: Do you have the deposition of Dr. Fischbach?

Mr. Kelner: I haven't seen it.

[fol. 82] Mr. Beckham: It is not our fault you don't have a copy. I have an extra copy in my file if you would like it, but the fact remains it was taken—he was represented at the deposition. Your Honor. We have an extra copy of it. I think.

The Court: Don't worry about it. I will overrule the objection. He can answer the question.

By Mr. Beckham:

Q. Do you have Dr. Fischbach's deposition?

A. No, I don't.

[fol. 85] "Cross examination.

By Mr. Sarpy:

"Q. How old are you, Doctor?

"A. Forty and one-half.

"Q. When did you finish medical school?

"A. June of 1940.

"Q. Where?

"A. L.S.U.

"Q. In New Orleans?

"A. New Orleans.

"Q. Do you hold any other medical degrees?

"A. I hold the degree of Bachelor of Science.

"Q. No other medical degrees?

"A. No.

"Q. And where did you perform your internship?

"A. Charity Hospital, New Orleans.

"Q. When?

"A. It's a split from July, 1940 to November 15, 1940 and December 15, 1945 to April 15, 1946.

"Q. Have you practiced medicine in New Orleans since that time?

"A. No, I took residency training in internal medicine from April 15, 1946 to April 15, 1949.

"Q. Where?

"A. At Veterans Administration Hospital, New Orleans, Louisiana.

"Q. So that your entire medical career has been here in New Orleans?

"A. Except for the time I was in the Army from November of 1940 to February of 1946.

"Q. Do you belong to any professional societies?

"A. Orleans Parish, Louisiana State, American Medical and American Trudeau Society.

[fol. 86] "Q. Doctor, have you sought to specialize in any field of medicine?

"A. Internal medicine.

"Q. What has been your experience in connection with chest diseases and tuberculosis in general?

"A. About three months training in tuberculosis at Veterans Administration Hospital, part of my internal medicine residency, about three years in the chest clinic at the Veterans Administration Regional Office as part time consultant and personal interest.

"Q. And how long would you say your experience in tubercular diseases extends?

"A. From about 1949 until about as far as training is concerned, until 1952.

"Q. And from 1952 to the present?

"A. As part of my internal medicine practice.

"Q. Doctor, do you know a man by the name of Daniel J. Sentilles?

"A. I do.

"Q. And when is the first time that you saw him professionally?

"A. May 1, 1953.

"Q. Will you please state what the circumstances were under which you saw him?

"A. I received word from Hotel Dieu Hospital that Mr. Daniel Sentilles was in the hospital and that Dr. L. S. Charbonnet requested a consultation with me.

"Q. What did you do?

"A. I responded to that consultation, according to my record, the same day that he called me.

"Q. And did you see Sentilles on that same day?

"A. I did.

"Q. And did you have an interview with him?

"A. I most certainly did.

[fol. 87] "Q. How long would you say that interview took?

"A. I would say forty-five minutes and I am guessing, purely on the basis of the fact that it usually takes me that long.

"Q. During that time, I assume that you went over his past history with him?

"A. I might have.

"Q. Will you please state what he told you on that occasion?

"Mr. Kerner: If you can recall.

"Mr. Sarpy: Or if his notes so indicate.

"A. Only thing I have were my notes on the consultation that I made, a copy of which I know that you have. Mr. Sentilles had had diabetes that was severe for the past five years—this consultation is dated May 1, 1953—which had become increasingly difficult to control. He also stated that he had had fatigue and malaise for three years, which had become worse in the past year; that for the past eight months he had frequent attacks of hoarseness and that there had been no weight loss.

"Q. What else did he say to you, Doctor?

"A. In response to my questioning, he stated that there was no history of tuberculosis exposure, that he had no fever nor chills and that there was no history of having lived in a coccidioidal area, that twenty years previously he had had a bout of severe pneumonia.

"Q. You queried him, Doctor, on his experience to some extent, did you?"

[fol. 88] "A. You mean what he was doing?

"Q. That's correct.

"A. Frankly, I don't remember; I don't remember.

"Q. In your report you state there is no history of exposure, no fever or chills.

"A. That's the exposure.

"Q. That's abbreviation for tuberculosis?

"A. Correct; no fever, no chills.

"Q. Did Sentilles tell you anything about having been injured aboard ship?

"A. He might have but I don't remember it.

"Q. If he had been injured aboard a ship on or about April 15, just fifteen days prior to his seeing you, and if he had fallen to the deck when the boat fell away from him in bad weather and if he had injured his left chest and if he had become drenched on such an occasion, that would have

been very pertinent information for you to have had, would it not, Doctor?

"A. I would think so, yes.

"Q. And if Mr. Sentilles had told you about that having happened within the recent past on May 1, 1953, you would have marked it on your chart, would you not?

"A. I would imagine I would have.

"Q. And you have nothing of that kind in your records?

"A. None whatsoever.

"Q. Doctor, did Mr. Sentilles give you any information at all concerning any trauma?

"A. May I look at something here?

"Q. Yes, sir.

[fol. 89] "A. I am now reviewing the present illness that is taken by the interne when he was admitted because I am certain that I read the entire chart.

"Q. That's not my question, Doctor. Did he ever tell you anything about any trauma?

"A. Not that I remember.

"Mr. Kelnor: Did I understand that he did or did not or you do not recall?

"The Witness: I do not recall.

"Q. Doctor, how many times did you see Sentilles altogether, would you say?

"A. He was in the hospital from May 1 to May 12, 1953 and as my usual practice, I probably saw him twice a day.

"Q. In other words, then, you probably saw him about twenty-four times?

"A. Approximately.

"Q. And in none of those instances did he ever complain of any injury having been received within the recent past?

"A. I do not recall any history of any injury.

"Q. Go on with your narrative, Doctor, as to what you did after your first interview with him.

"A. After my first interview, I reviewed the films of his present admission—the x-ray films of his chest—and compared them with films that were already taken of his chest in June of 1950 and June of 1952. These films were reviewed at the x-ray department at the Hotel Dieu Hospital.

[fol.90] "Mr. Kelner: May 1, 1953?

"The Witness: That's the date of my own consultation. I am not sure about the x-rays. Let me check that. No, I'm sorry, this must have been compared with the x-rays that he brought with him and I don't have the date. Let me see if I do. That's the x-rays that he brought with him and I don't have the date. Let me see if I do. That's the x-rays that he brought with him from New York but I don't have the date of that. I think it was somewhere in April. I think you had mentioned that before.

"Mr. Kelner: So that's the x-rays of June, '50, June, '52 and middle of April, '53?

"The Witness: That's correct. In looking over those x-rays I found that in June of '50 there was fibrotic infiltration in the left mid-lung field. Examining the x-rays of June of 1952 and comparing with that x-ray of June, 1950, it was my interpretation that the infiltration of the left mid-lung field previously noted in June of 1950 had increased in extent in the film of June, 1952 and that there was further infiltration towards the left lower lung field above the level of the fourth left interior rib. It was also noted that the x-ray with which Mr. Sentilles presented himself, in comparison with that previous x-ray, that there was a cavity in the left lower lung field, which presented a small fluid level and marked peripheral reaction around the cavity. I then made a consultation out to Dr. [fol.91] Charbonnet, in writing, and my conclusion was that there was a probable diagnosis of tuberculosis and that future study would be required to rule it in or out.

Mr. Kelner: I will then skip to page 10.

"A. I then proceeded to write orders in order to further define the etiology of the lesion in his chest and control his diabetes. Orders were requested for sputum tests, tuberculin skin tests. He was given no therapy except for the care of his insulin under my care. All of the sputum that was secured at Hotel Dieu was subsequently reported on the cultural as positive for the presence of many tuberculosis bacilli. A further consultation was made on May 6, 1953 to Dr. Taquino for bronchoscopy."

Mr. Kelner: Let's turn to page 14.

"By Mr. Kelner:

"Q. Doctor, assume that in the middle of April of 1953 that Mr. Sentilles was injured when his ship fell away from under him because of high seas and that he fell approximately ten feet to the deck, landing on his left side and left chest, and that he slid twenty-four feet across the deck and had waves wash over him, soaking him; that prior to the date of this accident he felt as though he were in good health but that immediately after this fall he had to be assisted to his cabin; that he stayed in or about his bed for approximately three days; that he noticed a congestion in his chest which stayed with him; that within [fol. 92] ten to fifteen days when he returned to New Orleans and you saw him on May 1, 1953, that during that period of time the chest congestion continued and that he had the signs and symptoms and in the chest x-rays that you found when you examined him, do have an opinion as to whether or not this fall that he had on ship could have aggravated or activated his prior tubercular condition?

"Mr. Sarpy: We object on the ground that the witness has already answered that question, in substance on our examination.

"Mr. Kelner: I am merely going over it again to be sure.

"A. Insofar as activating the disease progression, I do not think it happened. I think he was already active for a year or ten to eleven months prior to his admission to Hotel Dieu. That it would exaggerate an existing pulmonary condition, by all means.

"Q. I believe you stated that it was mildly active, is that the term that you used?

"A. As of June of '52?

"Q. Yes, sir.

"A. Yes.

"Q. The sudden onset of the symptoms immediately after the fall would tend to indicate the sudden aggravation by the fall, would they not?

"A. According to my record, this patient had had symptoms for about eight months; frequent hoarseness, with

his diabetes more difficult to control, which is worse for one year certainly if his symptoms had suddenly markedly increased in a short period of time over what [fol. 93] we have here, I think we'd be forced to state that whatever injury he had to his chest would certainly exacerbate his disease at the time of the onset of those symptoms but I have no record of that particular symptomatology.

"Q. Would you explain the term exacerbate? I believe you stated that this fall could have exacerbated his symptoms, is that what you said? Will you explain what that word means so that a jury can understand it?

"A. Increase his symptomatology—make the symptoms worse.

"Q. In other words, this fall could have made his symptoms worse, is that it?

"A. Yes.

"Q. Now, Doctor, getting back to your qualifications, are you what is commonly known as a specialist amongst laymen?

"A. That's correct.

"Q. Specialist in the field of internal medicine?

"A. Yes.

"Q. And is it common practice for other doctors to refer their patients to you in the field of internal medicine?

"A. It is.

"Q. A good portion of your practice then, I assume, is based upon patients that are referred to you by other doctors?

"A. Mostly other patients.

"Q. But you are a specialist in the field of internal medicine?

"A. That's right.

"Q. You have stated that in June of 1950 the x-ray showed a small fibrotic infiltration. Just what does that word fibrotic mean? What does small fibrotic infiltration [fol. 94] mean? Can you break that up for us so we can understand?

"A. Fibrotic refers to a scar area and infiltration is a linear density as seen on the x-ray. Putting those two together, we must say that this linear density that we see

in the x-ray represents some form of scarred area in the left mid-lung field.

"Q. Would I be correct in stating that in June of 1950 these words "small fibrotic infiltration" as you have described them, mean a small scarred inactive area?

"A. Yes.

"Q. Is the lung tissue an especially fertile field or sensitized for tuberculosis bacilli?

"A. It is."

"Q. And can a sudden blow on the chest cause the spread of the tuberculosis bacilli on this sensitized lung tissue?

"A. It can.

"Q. And can a severe blow on the chest cause an active and rapid spread of the tuberculosis from a relatively inactive or latent source to an active full-blown tuberculosis condition?

"A. Yes, it can.

"Q. Are x-rays used by tuberculosis specialists, that is, doctors, to show the progression of the disease?

"A. They are.

"Q. And did your x-rays that you examined in June of 1950, in June of 1952 and in May of 1953, show that progression?

"A. It was my impression that they did.

"Q. Did they show a progression from the relatively inactive or dormant tubercular condition to an active, full-blown tubercular condition?

[fol. 95] "A. I can't answer that question except in retrospect because I am not sure this lesion in the left mid-lung field was a tuberculous lesion. In retrospect I feel that it was.

"Q. Then do I understand that your answer with reference to the x-rays of June, 1950 was that it was so small, so minor that it might not have even been tubercular?

"A. That's correct. In retrospect I have to assume that it was.

"Q. So small it might not have even been entered as of that time?

"A. That's correct.

"Q. What effect does the chilling of the body by water washing over the body, a severe blow to the chest, inhala-

tion of water, the restriction of aeration by the blow, to the chest, have upon the aggravation of the pre-existing, dormant tubercular condition?

"A. Well, it's quite apt, because of diminution in bodily resistance because of the spread of caseous material—I use the term through the bronchial tree—there may be acute dissemination of the tuberculosis.

"Q. Can the body economy be so disturbed by the blow, by the sudden chilling of the body, by the inhalation of water, can that body economy be so disturbed that the tubercular process gains a much better foothold?

"A. Yes.

"Q. In other words, these factors lower resistance, is that correct?

"A. That's correct.

"Q. And pre-existing latent or fairly latent or dormant tubercular condition can become full-blown and active by these conditions that I have mentioned?

"A. That's correct."

[fol. 96] Mr. Beckham: We will stipulate that the bill was incurred, but not that we are responsible for it.

The Court: All right; so stipulated. What was the amount?

Mr. Kelnor: \$57.00.

The Court: It is agreed that the charge is reasonable.

"Q. Doctor, based upon your examination of this man and the tubercular process that you observed, can you state whether or not this man will have some remnants of his tuberculosis for the rest of his life?

"A. I'd answer yes.

"Q. Will this man need future medical care and attention?

"A. It is likely that he will.

"Q. Can you tell us what that future medical care and attention will be?

"A. He will need to be followed up by periodic x-rays, probably sputum examinations.

"Q. How often and how much?

"A. I am unaware of what the stage of his disease is at

the present time. I don't even know if the man is still living.

"Q. I understand that.

"Mr. Sarpy: If you feel you don't have enough evidence to answer the question, Doctor, say so.

"A. What was the question again?

[Vol. 97] "Q. The question is based upon your examination of the man at the hospital and your examination of him and the diagnosis that you made. Will he need medical care and attention for the rest of his life?

"A. My answer to that would be yes.

"Q. And I request what would that medical care and attention consist of?

"A. He should have periodic x-rays. How often that should be done, I can't answer. If it's inactive, I would say once a year would probably be sufficient, probably a good compromise would be every six months.

"Q. And how much would one of these examinations cost, including the cost of the x-rays?

"A. Probably \$30.00 each time.

"Q. Assuming that his tubercular process was now inactive, can you state with any degree of medical probability whether or not he may have future flareups of his condition?

"A. I can't answer that question.

"Q. Do I understand your answer to be that he may have or he may not have but you cannot tell?

"A. I just can't tell.

"Q. Ordinarily when a patient has an active tubercular process such as you say, do they occasionally or often have flareups later in life?

"A. It's the nature of the beast that they will flare up.

"Q. Is that not the purpose for these periodic examinations that you mentioned?

"A. That's right.

"Q. To watch out for future flareups?

"A. That's right.

"Q. Doctor, would the severity of the impact or blow to the man's chest have a bearing upon the extent or degree

[fol. 98] of the aggravation or spread of the dormant tubercular process?

"A. I would think so. I would think that a blow that was fairly light by that I mean just a simple tapping of the chest would be unlikely to spread disease, whereas a severe blow would be certainly more likely.

"Q. And the more severe, the more likely the spread?

"A. I think so.

"Q. And the more extensive the spread?

"A. I don't know about the extensiveness but certainly more likely to spread."

Mr. Kelner: No further questions. You may offer any portion of it you wish.

The Court: Do you have any questions?

Mr. Beckham: Yes, sir.

"I understand, Doctor, that the diagnosis revealed pulmonary tuberculosis, is that correct?

"A. That's correct.

"Q. Would you say that that condition in this patient was of recent origin or of standing for some months?

"A. My diagnosis on discharge from the hospital is a part of the record and is that patient has tuberculosis, pulmonary, far advanced, active one year, Class I.

"Q. When you say active one year, what do you mean by that?

[fol. 99] "A. That means, I consider that he had active disease for one year.

"Q. That's prior to May 15?

"A. That's prior to May 1.

"Q. Prior to May 1 of 1953?

"A. That's correct.

"Q. That means then that it was active, in your opinion, on May 1, 1952?

"A. I would like to change that and state that it was active as of some time in June of 1952.

"Q. Doctor, pulmonary tuberculosis is a disease that develops somewhat slowly, is it not?

"A. That's correct.

"Q. And in view of what you have stated, assuming that the man had received a trauma at sea on or about April 15,

1953, which he apparently told you nothing about, and that he had injured his chest and that he had some water strike him and wet him would that have any effect on the condition that you found?

"A. Yes, sir, it could have had the effect of flaring up a previously inactive disease process.

"Q. But you said this was active since June of 1952?

"A. That's correct.

"Q. Since this was active since June of 1952, could such a trauma and wetting in April of 1953 have had any effect on the condition that you found?

"A. I think so. For example, a man could have active tuberculosis that is very slowly progressing and have a sudden assault of trauma to his chest and the disease become very widely disseminated.

"Q. It is a fact, isn't it, that the past record of this man as you know it, particularly the presence of chronic diabetes, would be conducive to the development of such a tubercular condition that you found?

(fol. 100) "A. The incidence of pulmonary tuberculosis is greater in diabetics so we must state that his disease certainly can be exaggerated by his diabetes. I am not sure that I am answering that question correctly.

"Q. To state it in another way, isn't it a fact that as compared with a man who would be otherwise well—

"A. The presence of diabetes is more likely to develop tuberculosis, yes.

"Q. What do you mean by active tuberculosis, Doctor—Active pulmonary tuberculosis?

"A. By active pulmonary tuberculosis, I mean a lesion which is tuberculous, which is either becoming worse or is progressing for the better.

"Q. And is there anything in this case, assuming that the man had had this wetting and this trauma at sea on the 15th of April, 1953, that would relate this illness to any one episode or, stated another way, can you give any one particular cause of his condition, as you saw it on May 1, 1953?

"A. When I saw him on May 1, 1953, not knowing any history of any trauma at the time that I saw him, my opinion was that he had progressively increased in his

disease state from that picture of June of 1952 and that the development was normal progression of the disease. That was my opinion as of May 1, 1953."

"Mr. Sarpy: That's all.

Mr. Beckham: Now it goes to page 24.

[fol. 101] "Re-cross examination.

"By Mr. Sarpy:

"Q. Doctor, I think you have indicated that the history of this man's disease over the previous year and including the previous eight months in which he had this hoarseness and other difficulty that you have seen, it is your opinion, is it not, that this disease became progressively worse over the period of that one year?

"Mr. Kelner: We object to the leading question.

"A. As of May 1, 1953, and without any knowledge of any trauma to this man's chest, I assumed that it was natural progress of the disease and he had become worse. That was my definite opinion as I saw him on May 1, 1953—it became worse as natural progression of the disease.

"Mr. Sarpy: That's all.

"Re-direct examination.

"By Mr. Kelner:

"Q. And your opinion as of this time, with the knowledge of the blow, the fall that I gave to you and the prior information, would that affect your opinion?

"Mr. Sarpy: We object to that question on the ground that there is no showing that such a trauma has actually [fol. 102] taken place. If you wish to assume that for counsel, that's another matter.

"Q. Answer my question, please, Doctor?

"A. It would not affect my opinion as to the activity of the disease because as I brought out, I believe that the disease was active as of June, 1952 but that certain exacerbation of the disease could have occurred as a result of this trauma.

"Q. In other words, this blow to the chest could have caused the condition to become much worse, is that correct?

"A. Yes, we have to state that that is correct.

"Mr. Sarpy: Was there any sudden change as a result of any information that you have, in that two week period from April 15, 1953 to May 1, 1953—anything dramatic, anything unusual?

"Mr. Kelner: You mean any information including any information that I gave?

"Mr. Sarpy: From the information from the records and as told to him by the patient?

"A. May I check something, please? I have no information in my records at all whereby the disease suddenly became acute. Is that what you mean?

"Mr. Sarpy: That's all; thank you, Doctor."

[fol. 103] Mr. Kelner: At this time, if the Court please, the Plaintiff wishes to read into evidence the deposition of Dr. Sydney Jacobs.

If Your Honor please, there is an objection that can be ruled on before the reading of this deposition.

The objection is noted on pages 29 to 32.

The Court: I think the objection is well taken. I can take judicial notice. I don't think it adds much to what has been testified to already anyway.

Mr. Kelner: This is the testimony of Dr. Sydney Jacobs taken in New Orleans on March 12, 1957. The questions that I am about to read were questions asked by myself at that time.

"Direct examination.

"By Mr. Kelner:

"Q. Will you please state your name and your occupation?

[fol. 104] "A. Sydney Jacobs, physician.

"Q. And where do you maintain an office?

"A. 509 Medical Arts Building, 2439 Prytania Street New Orleans.

"Q. Are you duly licensed to practice your profession in the State of Louisiana?

"A. Yes.

"Q. When were you so licensed?

"A. 1930.

"Q. Of what institutions are you a graduate?

"A. Tulane University, Bachelor of Science and Doctor of Medicine.

"Q. And when did you receive your degree in medicine?

"A. 1930.

"Q. Did you thereafter receive additional training by way of internship?

"A. Internship at Touro Infirmary of New Orleans for one year, medical residence, General Hospital, Syracuse, New York, second year.

"Q. Have you had occasion to specialize in any given field?

"A. Diseases of the chest. I am certified by the American Board of Internal Medicine and by the Sub-Specialty Board in Pulmonary Disease.

"Q. When you say that you are certified, does that mean that your fellow physicians have examined your qualifications and approved your service in that capacity?

"A. Yes, sir, it means that an organization called the American Board of Internal Medicine, which has representatives from the various recognized specialty bodies in internal medicine, conducted an examination and issued a certificate. It means further that a second examination at a subsequent date was taken in pulmonary diseases [fol. 105] and a similar certificate so issued.

"Q. In other words, that certification is not merely an honorary thing but it's something that has been earned?

"Mr. Sarpy: Please don't lead your witness.

"Q. Is that correct, Doctor?

"A. Yes, sir.

"Q. Are you affiliated with any hospital locally?

"A. Yes, sir.

"Q. What hospital and in what capacity?

"A. Touro Infirmary, Senior in Medicine. I was Chief for four years until my term expired on December 31; senior visiting physician at Charity Hospital of Louisiana

in connection with pulmonary diseases and consultant to the Elint-Goodridge Hospital of Dillard University; consultant, Memorial Mercy Home and Hospital; consultant in pulmonary diseases to the United States Public Health Service Hospital at New Orleans; consultant in radiology for Louisiana State Board of Health and consultant in pulmonary diseases to the Veterans Administration Facility, Regional office at New Orleans.

"Q. I take it from the qualifications that you have just listed that you are what we laymen would commonly call a specialist?

"A. Yes, sir.

"Q. You specialize in chest diseases?

"A. Yes, sir.

"Q. And does that include tuberculosis as one of the chest diseases?

"A. Yes, sir.

[fol. 106] "Q. In other words, you'd be called a specialist then by laymen in that field of tuberculosis of the chest?

"A. Yes, sir.

"Q. Is it a common practice for other doctors, general practitioners, to refer patients to you for problems dealing with tuberculosis of the chest and other chest diseases?

"A. Yes, sir.

"Q. Are you a member of any professional medical associations? I don't think I asked you that, Doctor?

"A. Yes, sir. I am a member of the Orleans Parish Medical Society, Louisiana State Medical Society, Southern Medical Society and American Medical Association. I am a member of the National Tuberculosis Association, the American College of Chest Physicians in each of their regional organizations. I am a Fellow of the American College of Physicians and member of a number of other medical organizations which I think would be in the same general category as those listed.

"Q. That doesn't leave much by way of honor in your field that you haven't already acquired, is that correct?

"Mr. Sarpy: Counsel, please don't lead the witness. That's the second time I have had to ask that. I wish you'd pay particular attention to that.

"Q. Do you have more than your share, let us say, of honors and qualifications?

"A. I wouldn't know what my share is, Mr. Kelner. If you refer to the dues I have to pay each year, yes.

[fol. 107] "Q. Now, Doctor, did you have occasion to examine or treat Daniel J. Sentilles?

"A. Yes, sir.

"Q. When did you first see him and where?

"A. I first saw Daniel Sentilles at the United States Public Health Service Hospital.

(Discussion off the record.)

"A. These are notes that I jotted down here. I am trying to get the date. It was shortly after he was admitted and I do not know the exact date but it was at the end of March or the beginning of June, 1953.

"Q. Will you tell us what your examination at that time disclosed to you?

"A. Pulmonary tuberculosis and diabetes mellitus.

"Q. Doctor, were you given a history concerning this man prior to the time of your examination?

"A. Yes, sir.

"Q. What history were you given?

"A. The history was that he had had pneumonia in 1922 and in 1935 he was operated upon because of a ruptured appendix; that in 1947 diabetes mellitus was found; in 1948 his gall bladder was removed; in 1950 he was said to have had a scar—all he knew was that he had a 'scar' on his lung.

"Q. This history was given to you by Mr. Sentilles?

"A. Yes, sir. That some time in 1952—and the history is not too definite in this regard—he had some respiratory tract symptoms for which he was given penicillin and that ultimately—and this history again is not too precise—he had what he thought was a bad cold and here again he [fol. 108] consulted Dr. Sidney Charbonnet, was admitted to the Hotel Dieu Hospital in New Orleans and Dr. Marion LeDoux was called in consultation. X-ray examination showed a cavity at the base of the left lung. He was bronchoscoped and then he was transferred to the United States Public Health Service Hospital on May 14, 1953.

"Q. This information with reference to his examination by Dr. LeDoux and admission to the Hotel Dieu, that all, of course, was early May of '53, is that correct?"

"Mr. Sarpy: Will you please not lead the witness. Those are leading questions and this is an intelligent witness and I ask that you not put words in his mouth. If he knows the answer, he will answer a direct question without the necessity of being led.

"Q. Do you know from the history when he saw Dr. LeDoux or was admitted to the Hotel Dieu?"

"A. I have the impression that he saw Dr. LeDoux on May 11, 1953 and I can be wrong by a few days on that date. The Hotel Dieu, incidentally, was a hospital. That's the name of a hospital here.

"Q. I understand. Would you tell us what course his ailment took from the time that you first examined him?"

"A. He was quite acutely ill when I first saw him. He had a large cavity at the bottom of the left lung and acid-fast bacilli were found in his sputum. Tuberculin test previously had been found positive by Dr. LeDoux at the Hotel Dieu and therefore this test was not repeated. There was no question at all then that he had active pulmonary tuberculosis. Treatment was started for him with isoniazid [fol. 109] and para-aminosalicylic acid. These are the drugs which are very effective in the treatment of tuberculosis. His sputum was examined repeatedly and it was found positive on at least three occasions after being admitted to the United States Public Health Service Hospital. Unfortunately, he developed a reaction to the PAS—that's the abbreviation for para-aminosalicylic acid. He was sensitive to that and he developed jaundice from the drug itself and he was quite a sick boy for a while and we were very much concerned about him. But streptomycin was substituted, he responded very well to this and he improved from his jaundice and his tuberculosis at the same time. His sputum test was negative by July 21, 1953 and, as far as I know, it's been consistently negative since that time. He incidentally, had one of the most gratifying and dramatic improvements in tuberculosis I have ever seen.

"Q. To what do you attribute that dramatic improvement?"

"A. To the efficacy of the drugs, to the fact that they were started at a very crucial time, that his tuberculosis was very acute at the time that the drugs were started and I believe we ought to give at least a little bit of credit to the help of the Lord. He was on our side.

"Q. Doctor, could you tell from either your examination originally or from any of the examinations or the course of his improvement, when the active tuberculosis had commenced?

"A. I wouldn't be able to pinpoint that, Mr. Kelner. I would surmise—and I must emphasize that is just chiefly a surmise because that is as far as I can go here—that on the basis of the x-ray that I saw at the United States Public [fol. 110] Health Service Hospital shortly after admission and the very rapid response to therapy, that is, to the drugs used in treatment, that he must have had his tuberculosis become active not too long before he was admitted to the hospital and when I say not too long, I am purposely being vague because I can't be more precise than that.

"Q. Do you have an opinion that you can express with a reasonable degree of medical probability, as to whether or not the onset of his active tuberculosis could have been or probably was in the middle of April?

"Mr. Sarpy: We object to the question on the ground that the Doctor has answered that proposition to the best of his ability and that any further questioning along this line would be futile.

"Q. You are permitted to answer.

"A. The question was, I believe, whether or not his tuberculosis could have become active about the middle of April. I believe that's the question?

"Q. Yes, sir, based upon reasonable medical probability.

"A. I have to guess and, of course, I would say I don't think it became active right at the middle of April. It would be almost impossible for me to make a statement to that effect.

"Q. Now, Doctor—

"Mr. Sarpy: Let him finish.

[fol. 111] "A. Yes, I have finished that part of it.

"Q. Do I understand your statement to be that you cannot pinpoint it to that extent?

"A. That's correct, yes, sir.

"Q. In other words, you don't know one way or the other? You can't state with certainty one way or the other, is that correct?

"A. That's correct.

"Q. Now, Doctor, assume that Mr. Sentilles, prior to April of 1953, had no ill symptoms, no feeling of difficulty, no chest congestion. Assume further, please, sir, that in the middle of April, 1953, he was injured when his ship fell away from under him by reason of high seas and that he fell approximately ten feet to the deck, landing on his left side and chest and that he then slid approximately twenty-four feet across the deck, having waves washed over him, soaking him; assume further, please, Doctor, that in May of 1952, chest x-rays taken of this man showed no sign of tuberculosis. Assume further, Doctor, that after having slid across the deck as I have described, that he was assisted in arising, was assisted to his cabin and that the following morning he noticed a congestion in his chest and that this congestion stayed with him. Assume that aboard ship the captain gave him a shot of penicillin and a shot of whiskey, that three days after the accident he reached port and that approximately one week later when he was examined by a Dr. Fischbach in New York, there was found an area of consolidation with a fluid level in the upper lobe. Assume that within ten to fifteen days after the accident he was placed—on May 1 of 1953—in the Hotel Dieu and that thereafter, on the dates that you have previously referred to, he was placed in the Marine Hospital in New Orleans. Do you have an opinion that you can [fol. 112] state, based upon reasonable medical probability, whether or not this man's fall to the deck of the ship could have been a competent cause for the activation or aggravation of his tuberculosis condition?

"A. Such a fall could have aggravated a pre-existing tuberculosis.

"Q. Now, is it not true, Doctor, that most of us at one time—

"Mr. Sarpy: That's a leading question; I object.

"Q. I'll change the form. Doctor, do most of us at one time or another have inactive tuberculosis bacilli in our lungs at one time or another?

"A. Not necessarily. That used to be believed and at one time that was undoubtedly true but I don't think it is necessarily true these days because the chances of someone being infected with tuberculosis have diminished considerably since the turn of the century and have diminished progressively each year. Many, many people—the exact number we do not know—perhaps approaching fifty per cent—and again, this is sheer conjecture—do have the germs of tuberculosis in their body in this country.

"Q. Doctor, x-rays taken at various intervals show a progression of tuberculosis—for example, if an x-ray taken in May of '52 showed no tuberculosis and x-rays and other evidences that you saw one year later, in May of '53, did show tuberculosis, would those x-rays not be fairly convincing and definite proof—

"Mr. Sarpy: Object to the question as being leading.

[fol. 113] "Q. I'll start again. Doctor, I don't mean to lead you in any way in these questions.

"Mr. Sarpy: That's exactly what you have been doing. I have asked you repeatedly and I think you can refrain from doing that.

"Q. Doctor, do you feel I am leading you in any way?

"A. I am not competent to answer that question, Mr. Kelner.

"Q. Doctor, what is the diagnostic use of a series of chest x-rays, namely, the chest x-ray taken, for example, in May of 1952, showing no tuberculosis, and chest x-rays taken in May of '53, showing tuberculosis?

"A. If an x-ray in May of 1952 showed no tuberculosis and x-ray in 1953 showed tuberculosis, it would be necessary to assume either that there was no tuberculosis in 1952 or that the amount of tuberculosis was so small as not to be demonstrable by the x-ray at that time, or that the tuberculosis was so situated that it would not be revealed by the ordinary type of x-ray.

"Q. Would those two x-rays have then been any proof of the progression of the disease?"

Mr. Beckham: Your Honor, I think that although at the time this deposition was taken no objection was made to the form of this question, it is obvious at that time there was no knowledge what would be in evidence at the time this testimony was elicited.

[fol. 114] Certainly this hypothetical question contains things which are not borne out, in fact, are contradicted by the evidence before the Court.

The Court: I will let him answer and then you can move to strike if it is not borne out. I presume there will be some testimony to contain those facts.

Mr. Beckham: Your Honor, do you want me to strike at this time? If so, I so move.

The Court: No. I presume he is going to have some evidence to sustain the question he put to him.

Mr. Kellner: (reading) "A. Such a fall could have aggravated a preexisting tuberculosis."

I will skip to the bottom of page 13.

"Q. Doctor, what is the diagnostic use of a series of chest x-rays, namely, the chest x-ray taken, for example, in May of 1952, showing no tuberculosis, and chest x-rays taken in May of '53, showing no tuberculosis?"

"A. If an x-ray in May of 1952 showed no tuberculosis and x-ray in 1953 showed tuberculosis, it would be necessary to assume either that there was no tuberculosis in 1952 or that the amount of tuberculosis was so small as not to be demonstrable by the x-ray at that time, or that the tuberculosis was so situated that it would not be revealed by the ordinary type of x-ray.

[fol. 115] "Q. Would those two x-rays have then been any proof of the progression of the disease?"

"A. If an x-ray shows no tuberculosis, assuming all technical factors to have been properly controlled, and if a subsequent x-ray shows tuberculosis, there is adequate basis for believing that the disease had progressed in the interim.

"Q. Doctor, assume that this man had a latent source of tuberculosis somewhere in his lungs which was not active

and which could not be demonstrated by x-ray in May of 1952, would the accident that I have described to you be a cause for the spread of the tuberculosis or the activation or the aggravation of the latent tuberculosis that I have mentioned?"

Mr. Beckham: Should we retain all objections on this same basis until later?

The Court: That is right. The record will indicate that Counsel objects to all of the hypothetical questions posed on the ground it is not in the record.

The objections have been overruled and the right to renew them is reserved in the form of a motion to strike for two reasons.

One, I believe, is that it was not made at the time of the taking; and secondly, the Court anticipates there will be some evidence to sustain the hypothetical question.

Mr. Kelner: On this there already is evidence.

The Court: In the record.

[fol. 116] Mr. Kelner: All right. I will go back and read that question again.

"Q. Doctor, assume that this man had a latent source of tuberculosis somewhere in his lungs which was not active and which could not be demonstrated by x-ray in May of 1952, would the accident that I have described to you be a cause for the spread of the tuberculosis or the activation or the aggravation of the latent tuberculosis that I have mentioned?

"A. It could very well be.

"Q. Can tuberculosis which is latent in the lungs—by latent I mean dormant, not active—can tuberculosis of that type be activated or aggravated by a blow to the chest or by a fall?

"A. Yes, sir.

"Q. Based upon the history of the accident as I gave it to you in the hypothetical question that I stated a few moments ago, and based upon the negative x-rays of May, 1952 taken by Dr. Charbonnet and the—

"Mr. Sarpy: We object to your saying that Dr. Charbonnet took any x-rays. He did not.

"Q. The x-rays that I have referred to in May of 1952, at any rate, do you have an opinion as to whether or not this blow that Mr. Sentilles received when he fell to the deck in April of 1953, activated or aggravated a preexisting dormant, latent focus of tuberculosis?

"A. It could have.

"Q. Is lung tissue particularly susceptible or sensitive to tuberculosis bacilli?

[fol. 117] "A. Yes, sir.

"Q. Can the body economy be so disturbed by a blow that the tubercular process can gain a foothold in the lungs?

"A. Yes, sir.

"Q. What effect would chilling of the body by means of water washing over it, the blow to the chest, inhalation of water, lack of aeration by constriction of the chest as a result of the blow, what effect would those things have upon a latent tubercular process—that is, tubercular process that was latent and dormant and ran into these situations that I have mentioned?

"A. Anything that weakens the body, whether it be a physical blow, a disease like diabetes, nutritional disturbance such as starvation or vitamin deficiency, perhaps even a severe emotional disorder, can reduce the ability of the body to fight off the effects of tubercular bacilli. I have by no means exhausted the things which can weaken the body. Those are merely prototypes."

Mr. Kelner: We will skip the legal arguments and go down to the bottom of page 17.

"Q. I will rephrase the question. Is there any connection between the time of a fall and the activation of a latent or dormant tubercular process?

"A. Yes, I believe this: That if a man has no evidence at all of tuberculosis and that he then sustains an injury of any type, that if that injury is going to aggravate whatever tuberculosis exists in the body, it ought to be demonstrable in no more than three months time. That is to say, anywhere from a few days up to three months ought [fol. 118] to be required for the development, the evolution and the demonstrability—if there is such a word—of the tuberculosis.

"Q. Does the history of this one fall within that pattern?

"A. It doesn't fall within the pattern that—

"Q. Let me rephrase that.

"Mr. Sarpy: No, let him finish.

"A. Wait a minute, let me see—does it fall within that pattern is the question you are asking me? I feel—you told me approximately April 15, is that the date given?

"Q. Yes, sir.

"A. Somewhere around that.

"Q. Developed his chest congestion and he was admitted to the Marine Hospital on May 1.

"A. May 1—I have seen development of tuberculosis under such circumstances and I have seen trauma aggravate tuberculosis.

"Q. By trauma you mean a blow?

"A. I mean a direct blow to the chest. I have seen persons who are under my supervision and whose circumstances were such that I was reasonably sure of what was going on develop within two weeks of the time of the injury and in this instance, it would conform to the pattern that aggravation of his tuberculosis at least was evident within two weeks of the time that he sustained this injury on April 15.

"Q. Does the severity of the impact have any relationship to the activation or the aggravation of the latent, dormant tubercular process?

[fol. 119] "A. In a general sense, yes, but it would be impossible to be precise concerning that. I have seen tuberculosis develop following mild trauma; I have seen tuberculosis fail to develop after severe trauma. I would say that trauma to the chest is one of the aggravating factors of tuberculosis but that it is not a quantitative factor.

"Q. Doctor, can you tell us when this man was discharged from the hospital?

"Mr. Sarpy: What hospital?

"Mr. Kelner: The hospital under his supervision, namely, the Marine Hospital. I believe that's the same as United States Public Health Service Hospital, isn't it?

"A. The proper title is United States Public Health Service Hospital. It used to be called Marine Hospital. He was discharged on the date I have is November 18, 1953. Again, there could be an inaccuracy of one day or two days at the most—well, no, November 18, 1953.

"Q. At that time, was he discharged as being fit for duty?

"A. No, sir, I don't think he was regarded as fit for duty at that time.

"Q. Can you tell us when he was considered fit for duty?

"Mr. Sarpy: We object.

[fol. 120] "A. No, sir, I do not know.

"Q. You are now testifying from your own records made in your own handwriting, sir?

"A. I am testifying that in my own handwriting he was discharged November 18 to out-patient duty—out-patient supervision at the hospital and I know nothing at all of his medical record subsequent to that time.

"Q. Did you see him at any time after?

"A. Socially, yes, but not professionally.

"Q. As of the last date that you saw him, November 18, 1953, can you give us any prognosis as to what future course his ailment would take?

"A. You are asking me to wipe out three years of actual observation for a man and I can be prophetic in saying now what should have happened from 1953 to 1957. At that time I regarded him as still having active tuberculosis but having been greatly improved and I regarded him as needing medical supervision for the rest of his life. I think that is about as much as I can say.

"Q. Will this man have flareups of this tubercular process—

"Mr. Sarpy: We object to that. The doctor says that he cannot go any farther. I think that you are trying to extend him a little too far, counsel. We object to any further questioning as to what might have happened after the last date that the doctor saw him.

"Q. Based upon your examination of him and your treatment of him for over 240 days, I believe it is, can you tell us whether or not this man will have future flareups?

[fol. 121] "A. I don't know whether he is going to have future flareups or not. He has a likelihood.

"Q. Can you explain that to us, please, sir?

"A. Yes. Tuberculosis is a chronic disease. It's the most chronic of all chronic diseases. The man has diabetes, which also is a chronic lifelong disease and while his tuberculosis, I would presume—and this is sheer presumption—is now inactive, there is always a possibility that under suitable circumstances it can become active.

"Q. I believe you stated that he will require medical supervision in the future?

"A. I think that anyone with tuberculosis should be under supervision for his life time.

"Q. Can you explain to us just what that medical supervision consists of and what it entails?

"A. It entails a close relationship between a man and a physician, who will examine him periodically, lay out for him a course of treatment, if such be necessary and above all, be on the lookout for signs of impending danger.

"Q. You have used the word periodically. Just how often would you recommend, Doctor?

"A. In similar instances, patients report to see me monthly until such time as the tuberculosis has been inactive six months, then every two months for a year, every three months for a year, every four months and ultimately every six months or annually. Obviously, this is merely a scheme and has to be modified in accordance with the individual case but I think that any man with a diagnosis of active tuberculosis should be examined by his physician at least annually for the duration of his life.

"Q. Can you tell us how much such an examination could cost?

[fol. 122] "Mr. Sarpy: I don't think that has anything to do with the case. I think you are going far afield and we object to the question.

"Q. You may answer it, please, sir.

"A. About \$25.00.

"Q. Would that require chest x-rays?

"A. Yes, sir.

"Q. Would that price of \$25.00 include the cost of those chest x-rays?

"A. Yes, sir.

"Q. Does this man owe you any money for medical services?

"A. No, sir.

"Q. Who has paid you for your medical services to this man?

"A. I saw him at the United States Public Health Service Hospital. I never sent him a bill and had no idea of ever charging him for my services.

"Q. Is this part of the United States Public Health Hospital service?

"A. Yes, sir.

"Mr. Sarpy: You were paid by the Government, weren't you?

"The Witness: Yes, sir.

"Mr. Kelner: I have no further questions. You may inquire."

Mr. Beckham: I will read the cross-examination. I will start at the bottom of page 23 with the question.

[fol. 123] "Q. Well, correction then. At the time that you saw him for the first time in the hospital and he related his history to you as you have testified under direct examination, and he explained his various past illnesses, what did he say to you, if anything, with regard to this alleged accident aboard ship?

"A. Nothing.

"Q. Doctor, when you questioned him as to his history, why did you ask him about that history?

"A. I do that with every patient.

"Q. Isn't it a fact, Doctor, that it's a reasonably necessary thing for you as a practicing physician, to get a slant on the man's past, in order that you might properly form your diagnosis and treatment?

"A. Yes, sir.

"Q. And as you go along in asking him for his past history, you no doubt ask him questions as to whether he has experienced anything of an unusual nature of one sort or another?

"A. Yes, sir.

"Q. Now, on this occasion, did you ask him if he had had any accidents or trauma or other physical difficulties?

"A. No, sir.

"Q. And he did not volunteer to give you any indication of any illness aboard ship?

"A. That is correct, sir. May I add this? At the time when I saw him at the hospital, he was very much agitated and he was not disposed to sit down and give me a clear cut logical exposition of this illness. He was very much disturbed about a number of things.

"Q. And he did manage though, Doctor, to give you a fairly lucid account of his previous illnesses, did he not?

[fol. 124] "A. Oh, lucid, yes, sir. At no point did I mean to indicate that he was mentally unbalanced.

"Q. You did not so indicate, Doctor, and let's put it this way: That he gave you an adequate explanation?

"A. Yes, sir.

"Q. How many times did you see him would you say in all, Doctor?

"A. Oh, I would say ten or a dozen times.

"Q. Over what period?

"A. Well, in the hospital.

"Q. Over what period of time, about?

"A. Five months.

"Q. When you saw him on subsequent occasions after the first occasion, he was more calm, let us say, and composed, isn't that correct, than he was at first?

"A. More, yes, but not back to a normal basis.

"Q. But he never, at any time that you saw him over those twelve visits, said anything about this accident at sea?

"A. That's correct, sir. By incident at sea, you are referring to an accident?

"Q. Yes, any incident at sea?

"A. That's correct, yes, sir.

"Q. If such an incident had happened, Doctor, and if he had suffered a trauma on the left side of his chest and if he had been through what counsel on direct examination gave you, in his hypothet, that would have been a very significant thing for you to know at that time, would it not?

"A. Yes, sir.

Mr. Beckham: Next to the last question at the bottom of page 26.

[fol. 125] "Q. Did he tell you that he had had hepatitis and jaundice and bronchial pneumonia in 1935?

"A. I don't recall his telling me that, no, sir."

Mr. Beckham: The second question on page 27.

"Q. Now, assuming that he had had all of those things, Doctor, combined with his history of chronic diabetes, such a person would be rather susceptible to pulmonary tuberculosis, would he not?

"A. Yes, sir.

"Q. Without the need of any type of trauma?

"A. Well, I don't like to talk about the need for trauma.

"Q. Well, without trauma?

"A. Yes, sir.

"Q. Of the various types of tuberculosis that there are, pulmonary tuberculosis is of a rather virulent type, isn't it?

"A. Yes, sir.

"Q. And you have already stated that pulmonary tuberculosis is a chronic disease?

"A. Yes, sir.

"Q. Isn't it true, Doctor, that pulmonary tuberculosis takes some time to develop?

"A. You would have to define some time and I assume by that you mean a long time but that is not necessarily true. Under adequate conditions, tuberculosis can become active and devastating within a period of weeks or months."

Mr. Beckham: Skip the next question.

[fol. 126] "Q. Well, other than trauma, there are many things in the history of this man that could have caused aggravation, isn't that correct, Doctor?

"Mr. Kelner: I object to the form of the question—could have—you must deal with reasonable medical probability.

"Mr. Sarpy: That I think is completely understood.

"A. I would say that of the factors given, trauma and diabetes were most likely the most important two.

"Q. Doctor, you have said that diabetes and trauma are most likely?

"A. The most likely two in this particular instance of the factors you enumerated.

"Q. And there isn't anything that would lead you to believe that it would be more likely that one or the other would be the cause in this case for such aggravation, would it?

"A. No, I would say it would have to be a combination of the two.

"Q. Do I understand that to mean that one alone would not be sufficient?

"A. No, sir, that's not correct. Either one would be sufficient but the combination of the two would, of course, be more incapacitating than either one, but I would not know how to tell you which of the two it is more likely was responsible in this instance."

Mr. Kelner: I think the objection has been ruled upon by the Court.

[fol. 127] Mr. Beckham: We are going to page 32 now, the first question after Mr. Kelner's statement on page 32.

"Q. Would you say that the patient's condition when you saw him indicated awakening of a quiescent condition?

"A. When I first saw him, it wouldn't have been possible to reach such a conclusion. Such a conclusion can be reached only by an accurate survey of what went before and what existed at the moment of examination.

"Q. Is it possible for you to reach that conclusion now, Doctor?

"A. I believe that his tuberculosis had undergone aggravation some time prior to his admission to the hospital.

"Q. Well, from your words, his tuberculosis had undergone aggravation?

"A. Yes, sir.

"Q. Some time prior to his admission to the hospital. I take that to mean that it had existed for quite some time in the past?

"A. That's my impression, sir.

"Q. Then it resolves itself into the question as to what caused the aggravation?

"A. Yes.

"Mr. Kelner: Is that the question you asked him, as to the cause of the aggravation?"

"Mr. Sarpy: I stopped right there, counsel.

[fol. 128] "Q. Why is diabetes, in your opinion, a contributing cause to this aggravation?"

"A. I made a particular study of diabetes and tuberculosis, Mr. Sarpy. I spent several years studying it, I read everything that I believe is published in the English language in seventy-five years before the study began, and I don't think anyone knows the answer to that question. It is known as a fact and there is so much evidence to support it as fact, that no one contests it being a fact, that people with diabetes are inordinately susceptible to developing tuberculosis, perhaps one to five times as frequently as the general population. The chemical reason for this, the logical reason for this, nobody knows. There have been, of course, many theories and hypotheses to explain it but no one knows for certainty.

"Q. Doctor, you have used the words 'inordinately susceptible.' Would you please elaborate on that?"

"A. The tubercular bacillus is practically everywhere. It's very easy for people to breathe in tubercle bacilli and to acquire primary infections of tuberculosis. For perhaps ninety-nine per cent. of the people that is of no great moment. Perhaps one per cent. of the people will find that this infection with tubercle bacilli will result in the sort of tuberculosis we have to treat. The chances of this primary infection leading into the kind of tuberculosis that we call clinical tuberculosis, which is the only kind that concerns us as physicians, are one to five times as great in the diabetic as in the non-diabetic."

Mr. Beckham: Those are all the questions on cross-examination.

Mr. Kelner: I will read the re-direct examination.

[fol. 129] "By Mr. Kelner:

"Q. Could this man have contracted his tuberculosis aboard ship?"

"A. Certainly, he could have contracted his tuberculosis anywhere from someone else who had tuberculosis.

"Q. Could it have been contracted aboard ship in April of 1953?

"A. I doubt it very much.

"Q. Could have been though?

"A. I don't think so, Mr. Kelner.

"Q. You have stated that the blow of the chest and diabetes, in your opinion, in this case were both contributing causes to the activation or aggravation of the pre-existing, dormant condition, is that correct?

"A. Yes, sir.

"Q. And you wouldn't want to venture any opinion as to whether one or the other contributed fifty per cent or twenty per cent or seventy-five per cent, is that correct?

"A. No, I wouldn't want to venture such an opinion.

* * * * *

[fol. 130] DR. SEYMOUR B. LONDON, having previously been sworn, resumed the stand and testified further as follows:

Cross examination.

By Mr. Beckham:

Q. You are the same Dr. London who was here with us yesterday; is that right?

A. That is correct.

Mr. Kelner: We shall so stipulate.

Q. Since yesterday, Doctor, have you had the opportunity or have you inspected or reinspected any of the depositions of other physicians involved in this litigation?

A. No, I haven't.

Q. You have never seen any of the hospital records or the other depositions except the ones you referred to yesterday, and those are Dr. Charbonnet, Dr. LeDoux and Dr. Jacobs, I believe?

A. That is correct.

[fol. 131] Q. Doctor, would you agree with me that hoarseness is one symptom of developing tuberculosis?

A. It may be.

Q. Would you agree that it is commonly accepted as one of the symptoms for tuberculosis?

A. It is a symptom of laryngitis and occasionally laryngeal tuberculosis is a concomitant of pulmonary tuberculosis.

Q. I don't want to argue with you. I wonder if you can give me a yes or no answer on these and then explain, if you will. It kind of leaves me up in the air. I don't know whether you are saying it is a commonly accepted symptom or it is not.

A. It may be, yes. It is.

Q. Would the same hold true for night sweats, where a person has a change in temperature causing him to sweat profusely?

A. Night sweats, yes.

Q. A general weakness or lassitude, or as they say, malaise, would that also be a symptom of developing tuberculosis?

A. Yes.

Q. And, of course, a prior infection or disease to the lungs, such as pneumonia, would also be a predisposing factor for weakness of the area. Is that also true?

A. Probably not so.

Q. Diabetes, you would agree, is a predisposing factor towards weakness of this resistance to tuberculosis?

A. That is generally agreed.

Q. If an x-ray taken in June, 1950, showed a small fibrotic infiltration in the left lung, and if an x-ray taken in June, 1952, showed an increase of that fibrotic infiltration, and if in May, 1953, another x-ray was taken showing a larger area as being involved, that too would be probably [fol. 132] the best evidence of progressive tuberculosis; isn't that right, Doctor?

Mr. Kelner: If the Court please, we object to this question on the grounds that it contains a false assumption.

The Doctor has testified, Dr. Charbonnet testified, when he examined the x-rays he couldn't find it. It was only in retrospect by Dr. LeDoux in looking backwards that he could see a small speck. The thing was so small that it could not be seen on the original x-rays either by the chest surgeon or the roentgenologist.

Mr. Beckham: It is the same x-ray whether they look at it five years later or the day after it was taken.

The Court: I think you had better use a hypothetical question in this case because there is a variance among the doctors as to the nature of those x-rays.

Mr. Beckham: The only real specialist we had said it was never there and he never saw it before.

Dr. Charbonnet admittedly made no diagnosis of this case at all. He referred the man elsewhere.

Dr. LeDoux is the man and the first time he saw the x-rays and saw the patient he diagnosed and read the x-rays as have stated.

The Court: There is a variance now.

[fol. 133] Mr. Beckham: I was asking him, if this did exist would that be a symptom of a progression?

The Court: Put it in a hypothetical question.

Mr. Beckham: This is the Plaintiff's evidence and we feel he is bound by it.

The Court: He is bound by his evidence. If he has three types of evidence, he is bound by all three. Since medical science is not exact, there is room for some contention.

By Mr. Beckham:

Q. Coughing is also a symptom, is it not, Doctor?

A. It is.

Q. Doctor, assuming now that in 1950 this plaintiff, Mr. Sentilles, had an x-ray showing a small fibrotic infiltration in his left lung, and then assuming further that in June, 1952 he had another x-ray which showed an increasing enlargement of that infiltration, with the background that he had had diabetes for approximately eight years prior to the time we are concerned with; also considering that he was weak and hoarse and suffered from lassitude for about six to eight months, and that there was evidence he was complaining of fatigue as far back as 1951; evidence that he did not follow his diabetic control instructions as the doctor would have liked for him to; further evidence that he was having colds and night sweats for about six to eight months and that he had recurrent colds, so to [fol. 134] speak, that he couldn't seem to shake off; then in May, 1953, or April it was, he fell down on the ship

and then the next day began complaining of coughing and had a deep cough in the chest, complaining of pain in the chest, and that about ten days later an x-ray showed a large fibrotic fluid cavity in the lung; isn't it true based on any degree of reasonable medical certainty you cannot say that this man's present condition was caused by anything that happened in the middle of April, 1953?

Mr. Kelner: I object to the form of the question.

We don't have to prove anything with certainty. The test is medical probability. Your Honor, and in addition to which the question is put in such a way that the Doctor is asked to guarantee something.

The Court: Let us put it the other way.

What if anything would that state of facts tend to prove or tend to establish with any medical certainty?

The Witness: If I may enlarge on the assumptions that were given me, I would briefly state we have some evidence that a fibrotic lesion was present in a preceding film in 1951.

In 1952 I understand there was another film taken showing slight progress in the same patient and same area; and approximately eight or nine months later a sudden change has occurred where we now have instead of a fibrotic lesion a fluid cavity level.

This is a change from a chronic fibrotic appearance— [fol. 135] Mr. Beckham: If the Court please, I would like to have an answer and then an explanation.

The Witness: You asked me many questions.

Mr. Beckham: I asked you one question.

The Court: Whether those facts establish any particular results, medically speaking, with reasonable medical certainty.

Can you say from those facts what was happening to the particular individual from a medical standpoint?

The Witness: I think you might say with certainty that a change had occurred in his condition relatively recently prior to the taking of the x-ray.

The Court: What x-ray are you referring to?

The Witness: May, 1953, the last x-ray, because that is an acute process. The fluid cavity is an acute affair as opposed to a chronic one.

By Mr. Beckham:

Q. My question is this: Can you state with any reasonable medical probability as to what caused that condition in view of all these prior symptoms this man had?
[fol. 136] A. I believe I can, yes.

Q. Will you tell us what in your opinion, based upon reasonable medical probability, was the cause for this happening?

A. I believe a situation existed whereby the patient's natural resistance to the disease deteriorated suddenly because of extraneous circumstances, either infection, injury or malnutrition, which are the common causes of sudden changes in tuberculosis.

I believe this occurred a relatively short period prior to the time of the last x-ray. I believe that these factors produced his deterioration.

Q. Now, we had the three factors there, malnutrition, infection and injury.

A. Any loss of his natural resistance.

Q. Either of those three could have done it?

A. Yes.

Q. And you have no way of knowing which of those three did it?

A. I have no way of knowing specifically.

Q. With reasonable medical certainty. You couldn't pinpoint it to one cause or the other from what you know?

A. The information I have, I couldn't say exactly what happened. I didn't see the patient.

Q. You never did. You never have seen him.

A. I have never seen him.

Q. Never examined him?

A. Never examined him.

Q. All you know is what we read in these depositions and what we told you here in Court?

A. That is right.

Q. One final thing, Doctor, on something we covered yesterday.

I want to make sure I remember it correctly. It was your testimony, was it not, that you could not say with any [fol. 137] degree of reasonable medical certainty that there

was any sudden change in this man's condition around the middle of April. You could not pinpoint the time to the middle of April.

A. From the information given to me I couldn't pinpoint the time.

Mr. Beckham: Thank you very much.

The Court: Is there anything further?

Redirect examination.

By Mr. Kelner:

Q. Doctor, could this man have changed the refrigeration motor with the fluid level cavity in his lung?

Mr. Beckham: I object to the question. There is no predicate whatsoever that the doctor is familiar with the work that he did, or that he knows what it takes.

The Court: Give him a little more facts. Is it a heavy object?

Q. Could a man with a fluid cavity level in his lung as demonstrated by x-ray have the physical strength, stamina and endurance to pick up, lift, move and change a refrigeration motor weighing 200 pounds?

[fol. 138] The Court: Could he do work where he had to do some heavy lifting?

Mr. Beckham: Your Honor, I don't believe there is anything in the record to show what he did, but I anticipate that the evidence will show he did not do it alone and that he had someone with him.

The Court: He can ask him a hypothetical question.

Mr. Beckham: He is talking about picking up 200 pounds.

A. I think that he could if he were accustomed to heavy work. The accustomed individual can do many things even under disability and handicap.

Q. You cannot tell one way or the other based on the information I have given to you?

A. That is correct.

Mr. Beckham: What was the answer?

The Witness: I believe he could.

Q. Assuming that the heavy manual labor took approximately two to three hours, would he feel the effects of that work if he had a fluid cavity level in his lung?

A. I think that he would probably not feel as well as if he did not have the cavity.

[fol. 139] Q. He would be able to notice the symptoms?

A. He may well have noticed the symptoms and he may well have fatigued more easily with a fluid cavity in the lung.

But the chances are with this type of medical probability this type of disease would produce acute prolonged symptoms of coughing and expectoration because it has the characteristics of producing fluid. Fluid is present in the x-ray.

Q. If this man had no spitting up or cough and no acute symptoms and immediately after the fall he did have acute, sharp symptoms, would that not tend to indicate the acute, sharp symptoms were caused or at least brought on by the fall?

Mr. Beckham: That is a leading question. We think the Doctor should be asked it properly worded.

The Court: The question is leading.

Q. What conclusion can you draw from the fact that this man had no acute symptoms before he fell and immediately after he fell he had the acute symptoms?

The Court: What acute symptoms?

Mr. Kehner: The acute symptoms of congestion of the chest and pain in the chest.

The Court: Go ahead.

[fol. 140] A. I think we draw a relationship between the incident and the symptoms. I feel that someone who did not have symptoms prior to an incident and developed symptoms later following an incident, there may be a causal relationship.

Mr. Kehner: No further questions.

Recross examination.

By Mr. Beckham:

Q. Doctor, assuming all these symptoms which I gave you, if he had those beforehand you couldn't say that with reasonable probability, could you, if he had all those things that I itemized to you?

A. I think I still could and I would amplify that by saying some of the things you itemized to me are not only caused by tuberculosis but may be caused by other diseases.

Q. I will grant you that.

A. I particularly refer to the fatigue, the malaise that you mentioned, and the hoarseness that can be caused by improperly controlled diabetes.

Q. Isn't night sweat one of the cardinal symptoms of tuberculosis? I mean one of the main ones?

A. Night sweat is a very prominent symptom.

Q. This man had that from six to eight months prior to the time he suffered this fall.

It is your medical opinion based upon reasonable certainty and medical probabilities that you can tie this up now with the fall rather than the infection or the malnutrition as possibilities also?

A. Would you please repeat the question? I want to answer it yes or no.

[fol. 141] The Court: Read the question.

(The last question was read by the Reporter.)

Mr. Kelner: May I ask, before the Doctor answers that question, whether he understands it? I do not.

Mr. Beckham: I don't think it matters whether Mr. Kelner understands it as long as the Doctor does.

I would be glad to rephrase it for you, Doctor.

The Court: Supposing you do. I think it is just a bit confusing.

By Mr. Beckham:

Q. Doctor, as I understood your testimony here several minutes ago, you could not tell with any degree of reasonable medical probability whether this man's trouble was

brought on acutely, as you say, by malnutrition, infection or trauma or blow. Isn't that still your testimony?

A. Those were the various factors that could produce this type of condition.

Q. I am asking you, isn't it your testimony that you cannot tell us which one of those was the cause with any reasonable probability, knowing the background that the man had?

A. I believe I have already testified that I thought that the trauma to the chest was the precipitating factor.

Q. That was not my understanding and if that is your testimony—

[fol. 142] The Court: I think yesterday he said that could be.

Q. I will grant you it could be, but malnutrition could be; is that right?

A. Yes.

Q. And also infection could be?

A. Yes.

Q. What we are concerned with, Doctor, is whether you can say as a matter of reasonable medical probability which one of those three precipitated this man's tuberculosis with the knowledge that he had night sweats, a cardinal symptom, for six to eight months; with the knowledge that he was hoarse for six to eight months, and other symptoms; with the knowledge that he was also suffering from a cough and recurrent colds and also that he was suffering from a feeling of tiredness; all of these things being symptoms for tuberculosis with the one I mentioned, the night sweats, a cardinal symptom.

Mr. Kelner: If the Court please, I object to the question. The Doctor has already answered it. This is merely argumentative.

The Court: I think he has answered it. He said he couldn't tell.

Mr. Beckham: If I can get that, I will be glad to quit.

The Court: He said he couldn't tell with the facts in hand that he knew about.

[fol. 143] The Witness: The information given to me, any one of many items could produce an exacerbation of tuberculosis.

Q. That is your testimony, any one of the three?

A. There are many others besides the three I mentioned. We might mention some more too so it is perfectly clear that these are not the only three things that can produce exacerbation.

Q. Restrict ourselves to what we know here. To what we know, what would you say are the three possibilities on this man?—Would they be the three you already told us about?

A. From the information I have gleaned from the testimony of the previous physicians that examined the patient and from the other information, I would feel that this man had an aggravation of his condition following this incident, whatever it was, that he injured his chest and that trauma produced an aggravation.

Q. We are back to where we started. We started with malnutrition, infection and a blow to the chest.

A. They can all operate simultaneously. We don't ever select one item and say that is the cause of any particular aggravation.

Q. I am asking you for a reasonable medical probability, and unfortunately that is what this lawsuit is based upon.

Mr. Kelner: The Doctor has answered this question over and over again, unless I am mistaken.

If Counsel is unhappy with the answer, that doesn't mean he has the right to continue asking for an answer.

[fol. 144] The Court: I will give him one more chance.

He said he can't tell whether all three of these or one of them or two of them or even other factors might have precipitated the condition which apparently was precipitated from the record he read somewhere about the time the first of April or May.

By Mr. Beckham:

Q. It was your testimony, wasn't it, that you couldn't place the time?

A. I couldn't place the specific date.

Q. As to the middle of April?

A. That is true.

Q. What the Judge has just stated, is that your testimony?

A. In your elucidation of the problem you asked me if the man fell on a certain day and I think you gave me a date. Based on that I can say that was the probable date.

Q. Based on your testimony yesterday from reading what the symptoms were you couldn't tell that it happened at any particular time?

A. That is true.

Q. Again what I want to find out is this: What the Judge just stated, is that your testimony, that the three causes or any one of the three might have been the cause?

The Court: I think he said, could have.

A. Any one of them could have aggravated the situation or all of them.

[fol. 145] Q. There is no way of telling which? They are all three present; isn't that right?

A. No way of my telling. I have no way of telling.

* * * * *

Mr. Kelner: At this time the Plaintiff wishes to offer in evidence a small portion of the deposition of Dr. Taquino, the doctor who performed the bronchoscopy.

I would like to read a small portion of Dr. Taquino's deposition. Since he finds nothing I want to read that portion of it in and you can offer the rest of it.

This is the testimony of Dr. James Taquino taken March 12, 1957 in New Orleans.

To summarize it, this is the doctor that performed the bronchoscopy; put the instrument down the man's throat and examined his lungs.

This was the direct examination:

"Question: I believe you stated on your examination of the left lower lobe, you found it to be reddened?

"Answer: Superior segment, yes, sir.

[fol. 146] "Question: Could you tell us what the cause of that was?

"Answer: No, sir.

"Question: Of your own knowledge or your own examination?

"Answer: The redness was not specific in nature, it was not diagnostic of anything except that it indicated inflam-

mation in that region and the exact nature of the inflammation could not be determined by visual examination.

"Question: You did not attempt to make any diagnosis then as to whether or not that redness was caused by a lung abscess of some type or by a tubercular lesion?

"Answer: That could not be determined visually; biopsy of that region was not taken.

"Question: In other words, it could have been either a lung abscess or some other—

"Mr. Sarpy: We object to that question on the grounds that Dr. Taquino is not an expert in the treatment of tuberculosis and that it was in his capacity only as an ear, nose and throat man in performing the work to which he has just testified.

"Question: In other words, you have no knowledge whatsoever with reference to the findings or diagnosis of any kind?

"Answer: That's correct, sir.

"Question: You merely performed the bronchoscopy to obtain specimens for analysis?

"Answer: By the laboratory.

"Question: And diagnosis, treatment, etc., that was performed by other doctors?

[fol. 147] "Answer: Yes, sir.

"Question: I show you this bill dated blank date, addressed to Mr. Daniel J. Sentilles in the sum of \$150.00 paid July 8, 1953, and I ask you if this is the bill that was rendered for the services that you performed?"

Mr. Beckham: We will so stipulate.

The Court: It is stipulated that the bill was reasonable for the services performed. You do not stipulate that the services were necessary on account of the alleged accident.

Mr. Beckham: That is correct. I would like to read from the bottom of page 5.

"Question: Now, Doctor, will you state in your own words, a narrative of your work and diagnoses, if any, concerning Sentilles, giving the dates?

"Answer: Consultation was first received on the 6th of May, first cognizant of the consultation on the 7th. Con-

sultation requested bronchoscopy for the purpose of visual examination and to obtain specimens from the respiratory passages of Mr. Sentilles. It was noted that he had been hoarse and examination of his larynx was also made. Consultation also mentioned that Mr. Sentilles had been diabetic, it mentioned—the x-rays showed a cavity of the left lower lobe. The examination was an indirect laryngoscopy on the 7th of May at which time no abnormalities were noted. The patient was scheduled for bronchoscopy on the [fol. 148] 8th of May. On the morning of the 8th of May, patient was prepared in the usual manner and bronchoscopy was undertaken, using local anesthesia."

Mr. Beckham: That is all.

Deposition of Allen B. Koltun omitted from the printed record pursuant to the designations as to printing heretofore copied at page 1.

* * * * *

DANIEL J. SENTILLES, a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct examination.

* * * * *

[fol. 152] Q. What port had you left and where were you going to immediately prior to this accident, which occurred in the middle of April, 1953?

A. We had left Santa Marta, Colombia.

Q. Headed where?

A. Miami.

Q. Did you have any duties with reference to the checking of the refrigeration motor in the forward hold or the forward hatch, whatever it is called?

A. Yes, sir.

Q. How often was it necessary for yourself or someone under you to check, to go on deck and cross the deck and down that hatch to check the forward refrigeration motor?

A. Normally the crew checks it every two hours.

Q. So it was necessary for someone, either yourself or some oiler, to go across the deck and check that refrigeration motor every two hours?

A. That's right.

Mr. Beckham: He is still leading, Your Honor.

The Court: Try not to lead him.

Q. Was that done on this voyage up to the time of your fall?

A. I think so.

[fol. 153] Q. Now, can you recall how long the seas had been rough before you had this fall?

A. The sea was rough from the time we sailed. The Montego is a small vessel and from the time we sailed for several days there was very heavy weather along that coast.

Q. When were you notified that there was something wrong in the forward hatch or forward hold?

Mr. Beckham: I don't think he said he was notified.

A. I was called.

Q. By whom?

A. By one of the engineers—I don't know who it was. I was told that the motor, the forward motor, was on fire and to come up right away.

Q. Did you?

A. I did.

Q. And who went with you?

A. I think there was the assistant engineer, Mr. Livingston.

Q. What did you find when you got there?

A. The motor was still burning and part of the cable leading to the motor the rubber was burning.

Q. By burning do you mean there was a spark or that there was active flame? What do you mean by burning?

A. There were actual flames. The insulation of the motor was burning and practically had burned up by that time.

Q. What did you and Mr. Livingston do?

A. We immediately cut off the juice and smothered the fire. Then we removed the motor and replaced it with another one.

[fol. 154] Q. Then what did you do?

A. Then after the motor was operating again and everything seemed normal I came up the companionway.

Q. Who went first?

A. I was first, and I stepped out of the companionway

Q. Do you mean the hatch?

A. That's right, the hatch-way to the deck, and I attempted to gain the lee side of the vessel.

Q. What is the "lee" side?

A. That is the side of the vessel protected against the wind. I made about three steps and the vessel took a very heavy sea and fell away leaving me suspended in the air, and when I came down I fell on the deck. By that time quite a big sea came over and I found myself in the chains of the vessel.

Q. What do you mean "in the chains"?

A. There is a section of railing where there are chains around the edge of the vessel and that is dismantled while loading cargo, and then put there for protection at sea.

Q. Let me show you this photograph, Plaintiff's Exhibit 1, and I call your attention to the chains along the edge of the vessel. Is that what you have reference to?

A. That's right.

Q. Now, how did those chains catch you or how did you catch them? Did you catch them with your hand?

A. When I finally stopped I was straddling one of the chains. If I hadn't straddled it I would have probably gone to sea.

[fol. 157] Mr. Scott: You indicate, "fall here", and you testified that you took about three steps from the door headed down the leeward side?

The Witness: That's right.

Mr. Scott: And according to your calculations you slid about 24 feet, is that correct?

The Witness: That's right.

[fol. 158] By Mr. Kelner:

Q. When you fell, Dan, did you fall on some portion of your body?

A. I fell on my left side to the best of my recollection.

Q. After this incident was over did you have any scrape or bruise marks?

A. My shirt was all torn . . .

Q. Where?

A. On the left side here. It was ripped open, I guess, going across the deck. My khaki pants were also torn on the seat. I had scratches on my skin indicating I had scraped the deck.

Q. Where?

A. Left side, hip and leg.

[fol. 159] Q. Did you get up yourself or did somebody help you get up?

A. The best I recall I think it was Mr. Livingston that helped me. I wouldn't swear it was him, but someone did help me out of the chains. I was a little dazed and actually foggy.

Q. Where did you go from there?

A. To the cabin.

Q. When you first came out of the companionway you were facing in which direction?

A. I was facing aft.

Q. Where would the bridge be in reference to that direction?

A. Directly in front of me.

Q. Did you see anyone on the bridge?

A. Yes, the captain, and I think the second mate.

Q. Did you proceed immediately out across the deck, or did you wait, or what did you do?

A. Frankly, I think I waited a bit due to the rolling and pitching conditions and the water coming on board, and then I made an attempt to go across the deck.

Q. While waiting there did the Captain ignore you, or did he change the course of the vessel or did he slow the motors in any way, do you know?

Mr. Beckham: We must object again as leading.

The Court: Sustained.

Q. What if anything did the Captain do while you stood in the companionway?

[fol. 160] Mr. Beckham: With the understanding that he doesn't know everything the Captain did.

The Court: What, if anything, did you see the Captain do?

The Witness: I didn't see him do anything.

The Court: Do you know if the Captain saw you or not?

The Witness: I couldn't answer that truthfully.

By Mr. Kelner:

Q. Now, how did you feel for the next day or two or three after you fell?

A. Immediately after getting to my cabin the Captain came down and gave me a stiff drink of whiskey. I changed clothes and then lay down for several hours. When I got up I was still a little woozy. The next day I woke up in the morning when they called me for breakfast and I was still pretty well shook up.

Q. What do you mean by that?

A. Like I was taking a cold. My sinuses were blocked up and so forth.

Q. Now, when you fell and this wave washed you into the chains I assume you got wet?

A. Yes, sir.

Q. Did you inhale any water?

A. I imagine I did. I don't know exactly. I was under water and I imagine I took some in.

Q. How long did it take after that to reach Miami?
[fol. 161] A. I think it was three days.

Q. Did you perform your usual duties during those three days?

A. I actually felt like I had the flu and I so indicated to the Captain, and he gave me a stiff shot of penicillin, I think it was. I was up and down and made the usual inspections, but I spent quite a bit of time in my bunk.

Q. Now, Dan, before you fell how did you feel?

A. I felt all right.

Q. Did you feel as though you had the flu?

A. No, sir.

Q. What was the first indication to you that there might be something seriously wrong with you?

A. Well, the first indication I had that something was seriously wrong was in New York.

Q. When you got to New York, how many days was that after you landed in Miami?

A. About ten days.

Q. And what happened up there in New York?

A. I had this cold from the time I left the ship. I visited my physician in New Orleans and he again gave me penicillin.

Q. Was that before you saw the doctor in New York?

A. I went from Miami to New Orleans and then to Washington and Boston and Halifax.

Q. What was the purpose of these trips?

A. Ship's business.

Mr. Scott: Object to this. I don't know where this is leading us.

Mr. Kelner: We feel that part of the proof of the issue was the sudden onset of the symptoms . . .

[fol. 162] The Court: Let's get a little closer to the real meat.

Q. When you saw Dr. Charbonette in New Orleans a day or two after this accident, did he tell you you had tuberculosis?

A. No, sir.

Mr. Beckham: Your Honor, we hesitate to interrupt but we must ask the Court to request Counsel not to proceed further with his leading questions.

The Court: Don't lead this witness any further, Counsel.

Q. How long had Dr. Charbonnette been treating you before this accident?

A. About 20 years.

Q. Did Dr. Charbonnette at any time during these 20 years give you any indication you had any chest difficulty or trouble with your lungs?

A. None whatever.

Q. Was there ever any mention of tuberculosis?

Mr. Beckham: Every question he asks is putting the words in the witness's mouth.

The Court: Sustain the objection. It is leading.

Mr. Kelner: I don't do it intentionally, Your Honor.
[Vol. 163] The Court: Don't mention any facts. Just ask him what happened.

By Mr. Kelner:

Q. What was the purpose of your seeing Dr. Fischbach in New York?

A. The cold persisted and that particular morning I got up and figured it was laryngitis and I had some conferences scheduled in New York so I decided to go to the doctor to clear it up.

Q. Where did you first meet Dr. Fischbach? Had you known him before?

A. No, sir.

Q. How did you learn of Dr. Fischbach?

A. In New York generally every large hotel has a resident physician, and they told me who the resident physician was and I made an appointment with him.

Q. What did Dr. Fischbach do or tell you?

A. He made an examination and suggested taking a picture.

Q. You mean x-rays?

A. That's right. Just from checking me he told me he thought I had walking pneumonia.

Mr. Beckham: This is strict hearsay at this point.

The Court: Sustain the objection. The jury will disregard what Dr. Fischbach said.

By Mr. Kelner:

Q. After you saw Dr. Fischbach where did you go?

[Vol. 164] A. After x-rays were taken Dr. Fischbach told me I was quite sick and should be hospitalized for further checking. I asked that I be let go home because I wanted to be close to my family.

Q. Then where did you go?

A. To New Orleans.

Q. Do you recall what you paid Dr. Fischbach for his examination and the x-rays?

A. I think it was around \$20. I am not sure.

Mr. Beckham: We will stipulate.

The Court: How much was it?

Mr. Kelner: Twenty-five dollars.

Mr. Beckham: We will stipulate to that.

By Mr. Kelner:

Q. How many days was it after you saw Dr. Fischbach that you went back to New Orleans and saw some other doctor?

A. I left that night on the plane and was there the next morning.

Q. Who did you see in New Orleans?

A. I immediately called Dr. Charbonette and went directly to the Hotel Dieu.

Q. The Hotel Dieu is a hospital, is it not?

A. Yes.

Q. What did Dr. Charbonette do for you after you went to the hospital?

[fol. 165] A. Well, he immediately took the pictures that Dr. Fischbach gave me, and then he took some more pictures and fluoroscoped me also.

Q. You mean x-rays.

A. That's right. He checked me very thoroughly that day and the following day he called Dr. LeDoux.

Q. What did Dr. LeDoux do for you?

A. He went further into the regular routine of checking for lung ailments. He made sputum tests and blood tests and regular routine tests.

Q. When were you first advised you might have tuberculosis?

A. I think the first advice I might have any symptoms of tuberculosis came from Dr. Fischbach. He said that I better pray to God I had tuberculosis because in his opinion it was something else. He said he hoped for my sake it was tuberculosis because there was possibly a cure for it.

When I reached the Hotel Dieu the doctor who reviewed the pictures told me the same thing.

The Court: Don't tell what other people told you.

Q. Did they perform some operation there on you?

The Court: Don't lead the witness. Just let the witness describe in his own words what happened.

A. They couldn't find anything in the sputum. I was there about eight days and they suggested bronchoscopy to get some washes.

Q. What was that and how was that done?

[fol. 166] Mr. Beckham: If the Court please, the doctors testified as to what they did.

Mr. Kelner: That's right. I think the doctors covered it.

Q. How long were you there in the Hotel Dieu, if you recall?

A. I think about fifteen days.

Q. I show you this bill in the sum of \$211.36 covering the period from May 1, 1953 to May 12, 1953, and ask you if this is the bill you received and paid for your stay there?

A. I assume it is. My wife paid it.

Q. Out of your funds?

A. I imagine so.

Mr. Kelner: We offer this in evidence as Plaintiff's Exhibit 7.

Mr. Beckham: No objection.

The Court: Admitted.

(Said document admitted in evidence and marked as Plaintiff's Exhibit 7.)

Q. Where did you go from the Hotel Dieu?

A. I went to the Marine Hospital.

Q. And how long did you stay there at the Marine Hospital?

A. I think about eight months.

[fol. 167] Q. In asking basically the same question the Judge asked you, were all the procedures referred to by Dr. Jacobs performed on you?

A. Yes, and a little more.

Q. Can you tell us what these doctors may not have described to you?

A. Well, it seems like in the testimony they claim

that my diabetes wasn't controlled, and that seems to be a factor in this thing and I would like to defend myself in that respect.

Q. Was your diabetes under control?

Mr. Beckham: I don't think the witness is qualified to draw a medical conclusion.

The Court: He can tell his condition so far as he knows it. He has been a diabetic for eight or nine years.

Q. Was there any change in your condition that you know of?

A. Actually some of this testimony that has been taken from the doctors has left something out. Prior to my illness I had learned to live with the diabetes quite well as most people do. My diabetic condition has been defined, even though the testimony didn't say it, to be a sort of uncontrollable diabetes due to the fact that at times my pancreas secretes insulin. I think if they were to check the records of the Public Health Service they would find that for about six weeks the best authorities of the Tulane Medical School . . .

[fol. 168] Mr. Beckham: Your Honor . . .

The Court: I don't think it is very material. I think we can all understand that diabetes is not a controlled disease as a rule.

Mr. Kelner: If Your Honor please, this has a very material bearing.

The Court: Then let's get to it.

By Mr. Kelner:

Q. What is the effect of an overdose of insulin when the pancreas actually starts to produce the insulin you are taking by injection?

Mr. Beckham: Just a minute.

Mr. Kelner: Let me rephrase it.

Q. What happens to you when you have an overdose of insulin?

Mr. Beckham: If Your Honor please, again . . .

The Court: Don't argue the case. Just tell us what happens if you get an overdose.

[fol. 169] Mr. Beckham: How does he know when he gets an overdose.

The Court: I think they all know that.

A. You break out in a sweat and get quite nervous and you are left quite sick if you don't counteract it in sufficient time. I had this condition and went to my doctors with it on several occasions and on each occasion they reduced the dosage of insulin per day, which they claimed was causing this condition.

By Mr. Kelner:

Q. What was your condition upon discharge from the Marine Hospital?

A. I felt very good. I felt as good then as I feel now. However, I was still under doctors' care and I had instructions not to do anything heavy. I felt six weeks after I went in as good as I feel today.

Q. What was your status on discharge?

A. Out patient.

Q. Were you discharged as being fit for duty?

Mr. Beckham: This is repetitious. We are not arguing about that.

Q. Have you ever been classified as being fit for duty?

A. No, sir.

Q. Now, were you receiving your pay of \$750 per month during the time you were aboard the vessel?

A. No, sir.

Q. When was your pay terminated?

[fol. 170] A. I think the first of May. Mr. Lamson notified me by mail that his attorney advised him to cut off all pay and reimbursement.

Q. Did you receive your pay up to May first?

A. Yes, I had been paid in advance.

Q. Have you received any pay since May first, 1953?

A. No, sir, not from Lamson.

Q. Did you have anything to do with the management of the vessel after May 1, 1953?

A. Yes, sir.

Q. Will you explain that?

A. The vessel got in trouble while I was in the hospital and Mr. Lamson was up north on vacation and couldn't be found, and the Coast Guard called me at the hospital and asked for instructions . . .

Mr. Beckham: This is again hearsay and I don't know where we are going.

The Court: That's right, you are not suing for wages. It doesn't make any difference.

Q. Did you do anything else with reference to the operation of this vessel while in the hospital?

A. Yes, I did. By telephone I ordered some parts and did some of the management work until the doctor stopped me and told me it wasn't good for my nervous condition.

Q. What was your next contact with the vessel?

A. After I came out of the hospital.

Q. Then what did you do?

[fol. 171] A. Around January, 1954, the ship was having trouble, and I had permission from the doctor to do light work so I helped the vessel primarily to keep going.

Q. Were you paid any salary at that time?

A. No, I was only paid expenses.

Mr. Beckham: Move to strike that.

The Court: Sustained. There is nothing material in this type of testimony.

Q. Were you paid any maintenance since the date of the accident?

A. No, sir.

Mr. Scott: I believe there is something in the pre-trial Order.

The Court: Somebody is wrong. Somebody said at pre-trial there was maintenance paid.

Mr. Beckham: On page 9 there is an item for medical bills. I don't think they automatically become maintenance, however.

Mr. Kelner: We both stipulated on the amount unpaid on the medical bills.

[fol. 172] The Court: I recall that some of it was paid. How much, or whether it was on medical or maintenance I don't know. Probably the witness doesn't know either. Will you stipulate he doesn't know what the payments were?

Mr. Kelner: I believe he does know that. I would like to ask him what he has paid himself.

There are bills here amounting to \$781.36.

The Court: Did you make those payments?

The Witness: Yes, sir.

By Mr. Kelner:

Q. Do you know what your contract provisions call for with reference to the amount of maintenance while you were disabled?

Mr. Beckham: If the Court please, there has been no showing there was such a provision.

Mr. Kelner: Can we stipulate on the amount of maintenance? I believe everybody knows it is \$8.00 a day.

Mr. Beckham: I object to Counsel testifying in the presence of the jury.

[fol. 173] The Court: I think we can all agree that seamen are entitled to maintenance and cure under the Marine Laws, providing their ailments are occasioned by injury or sickness while they are engaged in their profession as sailors and as a result of some injury or sickness occasioned while in the performance of their duty, and that they are entitled to it up to the time of their maximum recovery.

While in the hospital they don't get maintenance because that is included in the hospital bills as well as the cure.

Maintenance is established as \$8.00 a day for such times when not in the hospital and up to the point of reaching maximum recovery. That is, provided it first be established that all this was occasioned by some fall or injury or some sickness occurred in the line of duty as sailors.

Juror: Is there a distinction for an injury occasioned by no negligence?

The Court: Negligence or non-negligence has nothing to do with maintenance and cure. If you get sick while working in your profession as seaman under the Marine Laws you are entitled to be maintained and cured up to the

point of what they call maximum recovery. Maximum recovery means up to the point where you can reasonably get back as far as you are going to get back. I will further explain that in the instructions.

Now, is it stipulated that he would be entitled to \$8.00 a day for maintenance, and is it also stipulated that the medical and hospital bills were paid?

[fol. 174] Mr. Beckham: Yes, sir.

By Mr. Kelner:

Q. Do you recall approximately when you left the Marine Hospital?

A. It was in November several days before Thanksgiving. I know it was just prior to Thanksgiving.

The Court: The doctor gave the date as November 18th. Do you agree with that?

The Witness: Yes, sir.

Q. I believe you stated you were discharged as an out patient. Did you continue to be an out patient at the hospital?

The Court: Let's find out what he did after that.

The Witness: I went home and stayed home and piddled around. I wasn't confined to my bed but I had to take periodic rests during the day. I stayed around the house.

Q. Did you have to see a doctor or have further medical treatment?

A. Right after I left the hospital I had to go back every two weeks.

Q. How long did that continue?

A. I guess for several months.

Q. Have the doctors ever discharged you?

[fol. 175] A. Not yet.

Q. When was the last time you went to the doctor to get treatment for your tubercular condition?

A. It must have been about six months ago.

[fol. 210]

ARGUMENT AND SUBMISSION—March 12, 1958

* * * * *

[fol. 211]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16776

INTER-CARIBBEAN SHIPPING CORPORATION, Appellant,

versus

DANIEL J. SENTILLES, Appellee.

Appeal from the United States District Court for the
Southern District of Florida.

OPINION—June 9, 1958

Before RIVES, TUTTLE and JONES, Circuit Judges.

JONES, Circuit Judge: The appellant, Inter-Caribbean Shipping Corporation, owned the S.S. Montego which it operated for the importation of bananas into the United States from South American ports. Daniel J. Sentilles, the appellee, described himself as a marine engineer specializing in refrigeration. He was employed by the appellant to operate or supervise the operation of the Montego. [fol. 212] He was responsible for the employment of the captain of the vessel. In April of 1953 the vessel was bringing a cargo of bananas from Santa Marta, Colombia, to Miami, Florida. Prior to the voyage the appellee signed on as a member of the crew in the capacity of chief engineer. The sea had been heavy from the time the ship left Santa Marta. During the second or third day out, and while the appellee was crossing the deck, the vessel fell away from him. He fell and slid, or was washed by a wave, some distance into the protective chain around the edge of the ship. He didn't know exactly but imagined he inhaled some water. The day following or the second day after this incident

the appellee developed a cough and felt like he had the flu. Although he spent quite a bit of time in his bunk, he made the usual inspections of equipment. He complained of head and chest pains until the ship reached Miami two or three days later.

The appellee left the ship when it reached Miami. About ten days later he was in New York where, his cold persisting, he consulted a doctor who told him, the appellee, he was a sick man and should be hospitalized for further checking. Appellee went to New Orleans and went into a hospital. There he contacted Dr. Charbonnet who had treated the appellee off and on for almost twenty years. The doctor made an examination including X-rays. Dr. Charbonnet called in Dr. LeDoux, a specialist in internal medicine with considerable experience in connection with chest diseases and tuberculosis. Dr. LeDoux made an examination. The discovery was there made that the ap-[fol. 213] pellee, who had been a diabetic for some years, then had active pulmonary tuberculosis. He transferred to the United States Public Health Service Hospital in New Orleans where he was treated for diabetes and tuberculosis. He was discharged from this hospital to out-patient status on November 18, 1953. In October, 1956, the appellee sued Inter-Caribbean Shipping Corporation, the owner of the Montego, claiming \$75,000 damages as a result of his injuries, and for maintenance and cure. An unseaworthy vessel and negligent operation of it were alleged. A jury trial was had. The appellant moved for a directed verdict at the close of the appellee's testimony and again at the close of all the testimony. Both motions were denied. A verdict for the appellee in the amount of \$20,000 was returned upon which judgment was entered. The appellant moved the court to set aside the judgment and enter judgment notwithstanding the verdict and, in the alternative, for a new trial. The motion was denied. This appeal followed. The sole question argued is whether there was sufficient evidence that the disabling illness of the appellee was caused by the occurrences on the S.S. Montego.

Testimony by deposition of four doctors who had treated or examined the appellee was introduced on his behalf. Dr. Charbonnet had known and treated the appellee over

a period of about eighteen years. His testimony disclosed a record of a number of past illnesses of the appellee including jaundice, hepatitis and bronchial pneumonia. He was consulted by the appellee when the appellee reached New Orleans after being in New York. From the report of [fol. 214] appellee's New York doctor Dr. Charbonnet learned that the appellee had a lung condition. Dr. Charbonnet was not, as he put it, "in that particular line" and would leave the diagnosis to Dr. LeDoux, the expert consultant whom he called in. Dr. LeDoux saw the appellee approximately twenty-four times while the appellee was at the Hotel Dieu Hospital. He found that the appellee then had pulmonary tuberculosis which apparently had been present for a year or nearly so at the time he was admitted to the hospital and that symptoms of tuberculosis had existed for about eight months. The doctor thought the X-rays indicated the possibility of a tubercular condition as early as 1950 and that it was clearly so in June, 1952. A light blow on the chest, he testified "would be unlikely to spread the disease, whereas a severe blow would be certainly more likely". So also, he said, tuberculosis can be aggravated by diabetes. Dr. Jacobs, who treated the appellee at the United States Public Health Hospital, testified that dormant tuberculosis could be activated and aggravated by "anything that weakens the body, whether it be a physical blow, a disease like diabetes, nutritional disturbance such as starvation or vitamin deficiency, perhaps even a severe emotional disorder can reduce the ability of the body to fight off the effects of tubercular bacilli." At the time Dr. Jacobs saw the appellee at the hospital the appellee was "very much agitated" and "very much disturbed about a number of things." Either diabetes or trauma, he stated, or a combination of the two could have aggravated the appellee's preexisting tubercular condition. He told of a study made by him of diabetes and tuberculosis and testified "that people with diabetes are inordinately [fol. 215] susceptible to developing tuberculosis, perhaps one to five times as great as the general population."

The appellee called as one of his witnesses, Dr. Seymour B. London, who had never examined the appellee. He testified, basing his opinion on the testimony of the other

doctors given by deposition, that he thought the fall probably aggravated the appellee's condition. But he admitted there were other factors which might have caused the aggravation of the tuberculosis and he had no way of telling which, and that it might have been any one or all of them.

The rule as to the medical testimony respecting causation which is required to take a case to a jury has been thus stated:

"It appears to be well settled that medical testimony as to the possibility of a causal relation between a given accident or injury and the subsequent death or impaired physical or mental condition of the person injured is not sufficient, standing alone, to establish such relation. By testimony as to possibility is meant testimony in which the witness asserts that the accident or injury 'might have', 'may have', or 'could have' caused, or 'possibly did' cause the subsequent physical condition or death or that a given physical condition (or death) 'might have,' 'may have,' or 'could have' resulted or 'possibly did' result from a previous accident or injury—testimony, that is, which is confined to words indicating the possibility or chance of, the [fol. 216] existence of the causal relation in question and does not include words indicating the probability or likelihood of its existence. * * * 135 A.L.R. 516."

The foregoing rule has been stated and applied in *Bearman v. Prudential Insurance Co.*, 10th Cir. 1951, 186 F. 2d 662; and *Chicago Great Western Railway Co. v. Smith*, 8th Cir. 1955, 228 F. 2d 180. And see *New York Life Ins. Co. v. Trimble*, 5th Cir. 1934, 69 F. 2d 849; *Southern Stereodoring Co. v. Henderson*, 5th Cir. 1949, 175 F. 2d 863; *Fort Worth & Denver City Ry. Co. v. Smith*, 5th Cir. 1953, 206 F. 2d 667. The least that the appellee was required to prove was that the aggravation of his tubercular condition was probably caused by the incident on shipboard. The most that he established was that the incident was a possible cause of the aggravation. This was not enough. The motion of the appellant for a directed verdict should have been granted and judgment for it will be here rendered.

Reversed and rendered.

RIVES, Circuit Judge, Dissenting:

The jury had a right to believe that the appellee was violently knocked down and washed some twenty-four feet along the deck into the chains around the ship. His skin was scratched and scraped on the deck, his shirt ripped open, his khaki pants torn on the seat, his head, shoulder, back, and ribs struck so hard that he thereafter made [fol. 217] complaints about them to the Captain. Within a short time he became ill, and within about two weeks his illness was diagnosed as active tuberculosis. Before his injury in April 1953, the appellee had been examined repeatedly by Dr. Charbonnet throughout the latter part of 1952, and as late as February 1953, two months before the accident, and Dr. Charbonnet had found no chest difficulties and no reason to suspect tuberculosis.

In reaching their verdict the jurors were not confined strictly to the opinions of the physicians, indeed those opinions were not binding on them. The jury had the right, and was under the duty to take a broader view, and to consider *all* of the facts and circumstances disclosed by the evidence. Upon such a view, I would agree with the district court that there was substantial evidence to support the verdict of the jury. I, therefore, respectfully dissent.

[fol. 218]

No. 16776

INTER-CARIBBEAN SHIPPING CORPORATION,

versus

DANIEL J. SENTILLES.

JUDGMENT—June 9, 1958

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and judgment here rendered for appellant in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Daniel J. Sentilles, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

“Rives, Circuit Judge, Dissenting.”

* * * * *

[fol. 236]

ORDER DENYING REHEARING—July 16, 1958

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

“Rives, Circuit Judge, Dissenting.”

[fol. 237] Clerk's Certificate (omitted in printing).

[fol. 238]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 2, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. ~~100~~ C

IN THE
**SUPREME COURT OF THE
UNITED STATES**

October Term, 1958 9

DANIEL J. SENTILLES,

Petitioner,

v.

INTER-CARIBBEAN SHIPPING CORPORATION,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT**

KELNER & LEWIS,
MILTON KELNER,

Counsel for Petitioner

25 West Flagler Street
Miami, Florida

I N D E X .

OPINIONS OF THE LOWER COURTS

JURISDICTION OF THIS COURT

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A

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IN THE
**SUPREME COURT OF THE
UNITED STATES**

October Term, 1958

DANIEL J. SENTILLES,

Petitioner,

v.

INTER-CARIBBEAN SHIPPING CORPORATION,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT**

Petitioner, Daniel J. Sentilles, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which reversed a judgment of the United States District Court for the Southern District of Florida. The District Court judgment had been entered in favor of the Petitioner pursuant to a jury verdict resulting from his seaman's suit for personal injuries.

OPINIONS OF THE LOWER COURTS

No opinion was rendered by the trial court.

The majority and dissenting opinions of the Fifth Circuit Court appear in the Appendix annexed hereto, pp. 4-7, and also can be found in the certified transcript of record filed herewith (R. 211-217). These opinions are reported in 256 F. 2d 156.

JURISDICTION OF THIS COURT

The judgment presented for review was dated and entered June 9, 1958 by the U. S. Court of Appeals for the Fifth Circuit. On July 16, 1958 that court denied the present Petitioner's request for rehearing, with one judge dissenting from such denial.

This court has jurisdiction to review the judgment complained of by writ of certiorari, 28 U.S.C. Sections 1254 (1) and 2101 (c).

QUESTIONS PRESENTED FOR REVIEW

1. In establishing a prima facie causal relationship between an accident and subsequent acute tuberculosis, is the plaintiff-seaman required to adduce medical testimony which excludes every other possible cause of his condition?

2. Can a federal appellate court, after a jury verdict and judgment for plaintiff-seaman, reverse that judgment by resolving evidentiary conflicts *against* the plaintiff-seaman?

3. Can a federal appellate court, after a jury verdict and judgment for plaintiff-seaman, ignore medical testi-

*Numbers following the "R" designation refer to pages contained in the transcript of record.

mony which clearly presented a jury question and reverse the judgment for alleged failure of medical proof?

1. Can a federal appellate court, after a jury verdict and judgment for plaintiff-seaman in a personal injuries action, enter judgment for the defendant where (a) at pre-trial conference counsel for the defendant admitted that the plaintiff sustained *some* injury and (b) undisputed testimony established at least *some* injury.

STATUTE INVOLVED

THE JONES ACT

41 Stat. 1007

46 U.S.C.A. Section 688—~~R~~Recovery for injury to or death of seaman

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in

such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

STATEMENT OF THE CASE

History

The Petitioner initiated his suit for personal injuries in a state court. The Respondent had the cause removed to the United States District Court for the Southern District of Florida. The amended complaint asked for money damages arising from personal injuries sustained as a result of the Respondent's negligence and or failure to provide a seaworthy vessel. The Petitioner also asked for maintenance and cure (R. 5-9). The Respondent denied all allegations of negligence, unseaworthiness, proximate causation, and damages (R. 10-12).

The cause proceeded to trial and resulted in a jury verdict and judgment in Petitioner's favor (R. 22-23). The Respondent took an appeal from the judgment to the United States Court of Appeals for the Fifth Circuit (R. 203). The sole question involved on appeal was the sufficiency of evidence to establish that the disabling illness of the Petitioner was caused by his shipboard accident (R. 213). The Court of Appeals reversed the lower court judgment and entered judgment for the Respondent, holding that the Petitioner had failed to prove that "the aggravation of his tubercular condition was probably caused by the incident on shipboard" (R. 216). Judge Rives dissented from the majority opinion (R. 216).

The Court of Appeals denied rehearing, with Judge Rives dissenting once more, and this Petition followed (R. 236).

Facts

The Petitioner was an engineer on the Respondent's ship S.S. Montego when the accident occurred (R. 151). In April, 1953, the ship encountered very rough weather on its voyage from Santa Marta, Colombia to Miami (R. 31). The vessel tossed and pitched through 25-30 mile-an-hour winds and twenty foot waves (R. 32, 35, 41). The Petitioner was crossing the deck when the ship "took a very heavy sea and fell away", leaving him suspended in the air (R. 154). He fell to the deck on his left side, hitting his head, shoulder and ribs (R. 35, 36, 158). A wave washed him twenty-four feet along the deck, into the chains around the edge of the ship (R. 154, 157). His skin was scraped and scratched by the deck, his shirt and trousers were torn, and he inhaled some sea water (R. 158, 160).

The Petitioner complained of pain in his head and side after the fall (R. 35). A day or two thereafter he developed a cough and pain in his chest (R. 39, 40). He felt as though he had the flu, and was treated aboard ship for a "heavy cold" (R. 39, 161). Although he had felt well and had no cough before the accident, he was described by the ship's captain as a "pretty sick man" with persistent chest complaints when the ship reached Miami three or four days afterward (R. 37, 39, 40, 161). About ten days later the Petitioner saw Dr. Fischbach (R. 161). A potential diagnosis of tuberculosis was made at that time (R. 50). The Petitioner returned home to New Orleans and was hospitalized and treated for "very acute" tuberculosis (R. 109).

Dr. Charbonnet had been the Petitioner's treating

physician since 1935. He examined the Petitioner in the months of May, July, August, September and October of 1952 and found *no* evidence of tuberculosis (R. 54). An examination as late as February 1953, *two months before the accident*, revealed no chest difficulties of any kind (R. 53).

The Petitioner's chest was X-rayed in June, 1950. The X-ray taken at that time showed a small, scarred, *inactive* area in the left mid-lung field (R. 94). An X-ray taken in May, 1952 gave no evidence of tuberculosis (R. 54). A third X-ray, taken about a month after the Petitioner fell, showed a cavity in the left lower lung field, with a fluid level and marked peripheral reaction (R. 90).

Additional medical testimony established that inactive tuberculosis is often present in a person, and that a blow to the chest can reduce the body's ability to fight off the tubercular bacilli (R. 71, 117, 118). It was further stated that the Petitioner's accident could have had the effect of flaring up a previously inactive disease process, and that a severe blow to the chest can cause an active and rapid spread of tuberculosis from an inactive or latent source (R. 94, 99). Against this general medical background, specific and far *more* significant medical testimony was offered for the jury's consideration. Since that testimony is the crux of the Petitioner's argument, it will be presented therein to avoid seemingly needless repetition.

ARGUMENT

1. *The opinion of the federal appellate court is, per se, ample proof that the court demanded medical testimony which excluded every possible cause of Petitioner's condi-*

tion other than his fall, in direct contradiction of all law on the subject.

It will be conceded, as stated in the Court of Appeals' majority opinion, that the Petitioner, in submitting the items of damage relating to tuberculosis, was required to prove that "the aggravation of his tubercular condition was probably caused by the incident on shipboard". (R. 216). Referring again to that opinion, the following will be found (R. 215):

"The appellee called as one of his witnesses, Dr. Seymour B. London, who had never examined the appellee. He testified, basing his opinion on the testimony of the other doctors given by deposition, that he thought the fall *probably* aggravated the appellee's condition. But he admitted that there were other factors which *might* have caused the aggravation of the tuberculosis and he had no way of telling which, and that it *might* have been any one or all of them". (emphasis supplied).

The foregoing quotation, in and of itself, shows that the appellate court did not apply the proper evidentiary test in determining whether or not the Petitioner (appellee) had presented a *prima facie* case. Obviously the appellate court decided that the medical testimony that Petitioner's fall *probably* aggravated his tubercular condition was not enough. The court's opinion also required that he prove that *no other factor could possibly have had the same result*. Such an evidentiary burden is unheard of in a civil suit, and surpasses even the reasonable doubt requirement of criminal prosecution.

In *Pan American Casualty Co. v. Reed*, 5th Cir., 240 F.2d 336, 339, the same Circuit Court, in considering the problem of medical causation, properly held:

"There is no dispute over the principles that govern the submission of such an issue to a jury. It is incumbent on one seeking a recovery to present probative facts from which, standing alone or forming the basis of expert testimony, the causal relation can reasonably be inferred. *** The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. *Galloway v. United States*, 319 U.S. 372, 395, 63 S.Ct. 1077, 87 L. Ed., 1458".

The above-quoted was written in 1957, and was entirely in accord with the law relating to the probative burden on medical causation, and in accord with the United States Supreme Court case which it cited, *supra*. The opinion under attack, written one year later, is in conflict with every federal decision relating to expert opinion evidence.

2. *Assuming, arguendo, that there were conflicts in Dr. London's testimony, the federal appellate court had no right to resolve those conflicts in the Respondent's favor, contrary to the jury verdict and judgment below.*

On at least three separate occasions Dr. London testified that the Petitioner's accident probably aggravated his tuberculosis and that "the trauma to the chest was the precipitating factor" of his advanced tubercular state (R. 75, 141, 143). Dr. London also stated, as noted by the fed-

eral appellate court, that there were other factors which might have caused the aggravation of the tuberculosis and he had no way of telling which, and that it might have been any one or all of them (R. 215). Reading this later statement in conjunction with *all* of the doctor's testimony leaves the decided impression that the doctor was merely recognizing the fallibility of informed medical opinion (R. 68-83, 130-145). His resultant inability to state *with certainty* that the Petitioner's fall was the *sole* cause of his impairment does not actually appear in conflict with his testimony that the fall was probably the responsible factor. Assuming, however, that such a conflict exists, it was clearly the province of the jury to resolve that conflict in the Petitioner's favor.

In *Liberty Mutual Insurance Co. v. Thompson*, 5th Cir., 171 F.2d 723, 726, the court held:

"Moreover, it is the function of the jury, if it sees fit, to reconcile the testimony of any witness who has made inconsistent statements, or to believe only such parts of his evidence as it deems worthy of belief; and the jury is not required to reject the entire testimony of any witness merely because there are conflicts therein. . . .

"Finally, the jury is the sole judge of the credibility of the witnesses and of the weight or value of their testimony. In actions at law in the federal courts, where the evidence is such that reasonable men may fairly differ . . . the right of trial by jury is preserved by the Seventh Amendment, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law'.

This means that an appellate federal court should not disturb the jury's finding of fact as to the accidental cause of appellee's disease if on the trial there was any substantial evidence to support it. This is so, even though the appellate judges may not believe the fact so found to be true, since an appellate court has no constitutional right to express an opinion as to the truth or falsity of such fact, the issue being entirely within the province of the jury."

It is implicit in the opinion under attack that the Court of Appeals completely ignored the above-quoted and determined, as a matter of law, that the jury *was not entitled to believe* Dr. London when he stated that the accident and the disease were causally related. The federal appellate court chose to usurp the jury's function and reweigh the credibility of the witness and the weight of his testimony. Such action has never been condoned by this court. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520, *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 504, 77 S. Ct. 443, 447, 1 L. Ed. 2d 493, *Webb v. Illinois Central Railroad Co.*, 352 U.S. 512, 77 S. Ct. 451.

We do not contend that the jury could not properly have reached the same conclusion as the appellate court. However, Dr. London's testimony was also reasonable support for the jury verdict in Petitioner's favor, and the decision was exclusively for the jury to make. The very essence of the jury's function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 504, 77 S.Ct. 443, 447, 1 L. Ed. 2d 493.

The federal appellate court's interference with the jury's verdict deprived the Petitioner of the fundamental right to jury trial guaranteed him by the Jones Act, the Constitution of the United States, and the decisions of this Court.

3. *The federal appellate court ignored other medical testimony which clearly presented a prima facie case.*

The majority opinion of the court below also considered the testimony of Dr. Jacobs, which was offered at trial by the Petitioner (R. 214) :

"Dr. Jacobs, who treated the appellee at the United States Public Health Hospital, testified that dormant tuberculosis could be activated and aggravated by 'anything that weakens the body, whether it be a physical blow, a disease like diabetes, nutritional disturbance such as starvation or vitamin deficiency, perhaps even a severe emotional disorder can reduce the ability of the body to fight off the effects of tubercular bacilli.' At the time Dr. Jacobs saw the appellee at the hospital the appellee was 'very much agitated' and 'very much disturbed about a number of things.' Either diabetes or trauma, he stated, or a combination of the two could have aggravated the appellee's preexisting tubercular condition. He told of a study made by him of diabetes and tuberculosis and testified 'that people with diabetes are inordinately susceptible to developing tuberculosis, perhaps one to five times as great as the general population'."

We will not waste this court's time by discussing the unfairly slanted recapitulation above-quoted. However, the appellate court's failure even to mention portions of Dr. Jacobs' testimony which were favorable to the Petitioner cannot be similarly passed over.

The doctor stated that traumatic aggravation of tuberculosis is demonstrable anywhere from a few days up to three months after the injury, and that the Petitioner's case history was in conformity with that time pattern (R. 117-118). In addition Dr. Jacobs testified (R. 129) :

"Q. You have stated that the blow of the chest and diabetes, in your opinion, in this case were both contributing causes to the activation of the preexisting, dormant condition, is that correct?

"A. Yes, sir."

Obviously the appellate court either decided to ignore the above testimony, or chose to disbelieve it, or again decided that the Petitioner must prove that his fall was the *sole cause* of tubercular aggravation. Under the authorities, recovery is not limited to those instances where a given injury is the sole cause of the resulting impairment. The wrongdoer must take the injured party as he finds him, and the concurrence of injury and disease does not defeat recovery for the consequent impairment. *Hern v. Moran Towing & Transportation Co., Inc.*, 2nd Cir., 138 F.2d 900, 902, *Hiltz v. Atlantic Refining Co.*, 3rd Cir., 151 F.2d 159, 161.

In its appraisal of the foregoing testimony the Court's attention is directed to a recent decision which held that under the Jones Act "the test of a jury case is simply

whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 523, 77 S.Ct. 457, 458.

4. *In view of the Petitioner's other undisputed injuries the appellate court had no right to enter judgment for the Respondent.*

We shall assume, *arguendo*, that the federal appellate court was correct in holding that the Petitioner had failed to establish causal connection between the accident and his tuberculosis. Even then the appellate court's entry of judgment for the Respondent, contrary to the jury's verdict, was improper.

The record affirmatively shows that counsel for the Respondent admitted at pre-trial conference that the Petitioner had sustained *some* injury as a result of the incident on shipboard (R. 13). Undisputed testimony established that the Petitioner sustained injuries totally unrelated to his chest. These included a pain in his head (R. 35), skin scratches on his left hip and leg (R. 158), and immersion in and inhalation of sea water (R. 154, 160).

The appellate court had no right to completely ignore even these minor undisputed injuries, and enter judgment for the Respondent.

CONCLUSION

For the reasons advanced by all the foregoing, this Court is respectfully requested to grant a writ of certiorari herein.

Respectfully submitted,

**KELNER & LEWIS,
MILTON KELNER**

Counsel for Petitioner

25 West Flagler Street
Miami, Florida

App. 1

A P P E N D I X

IN THE

**UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 16776

INTER-CARIBBEAN SHIPPING CORPORATION

Appellant.

versus

DANIEL J. SENTILLES.

Appellee.

**Appeal from the United States District Court for the
Southern District of Florida**

(June 9, 1958)

Before, RIVES, TUTTLE and JONES, Circuit Judges:

JONES, Circuit Judge: The appellant, Inter-Caribbean Shipping Corporation, owned the S. S. Montego which it operated for the importation of bananas into

the United States from South American ports. Daniel J. Sentilles, the appellee, described himself as a marine engineer specializing in refrigeration. He was employed by the appellant to operate or supervise the operation of the Montego. He was responsible for the employment of the captain of the vessel. In April of 1953 the vessel was bringing a cargo of bananas from Santa Marta, Colombia, to Miami, Florida. Prior to the voyage the appellee signed on as a member of the crew in the capacity of chief engineer. The sea had been heavy from the time the ship left Santa Marta. During the second or third day out, and while the appellee was crossing the deck, the vessel fell away from him. He fell and slid, or was washed by a wave, some distance into the protective chain around the edge of the ship. He didn't know exactly, but imagined he inhaled some water. The day following or the second day after this incident the appellee developed a cough and felt like he had the flu. Although he spent quite a bit of time in his bunk, he made the usual inspections of equipment. He complained of head and chest aches until the ship reached Miami two or three days later.

The appellee left the ship when it reached Miami. About ten days later he was in New York where, his cold persisting, he consulted a doctor who told him, the appellee, he was a sick man and should be hospitalized for further checking. Appellee went to New Orleans and went into a hospital. There he contacted Dr. Charbonnet who had treated the appellee off and on for almost twenty years. The doctor made an examination including X-rays. Dr. Charbonnet called in Dr. LeDoux, a specialist in internal medicine with considerable experience in connection with chest diseases and tuberculosis. Dr. LeDoux

made an examination. The discovery was there made that the appellee, who had been a diabetic for some years, then had active pulmonary tuberculosis. He transferred to the United States Public Health Service Hospital in New Orleans where he was treated for diabetes and tuberculosis. He was discharged from this hospital to out-patient status on November 18, 1953. In October, 1956, the appellee sued Inter-Caribbean Shipping Corporation, the owner of the Montego, claiming \$75,000 damages as a result of his injuries, and for maintenance and cure. An unseaworthy vessel and negligent operation of it were alleged. A jury trial was had. The appellant moved for a directed verdict at the close of the appellee's testimony and again at the close of all the testimony. Both motions were denied. A verdict for appellee in the amount of \$20,000 was returned upon which judgment was entered. The appellant moved the court to set aside the judgment and enter judgment notwithstanding the verdict and, in the alternative, for a new trial. The motion was denied. This appeal followed. The sole question argued is whether there was sufficient evidence that the disabling illness of the appellee was caused by the occurrences on the S.S. Montego.

Testimony by deposition of four doctors who had treated or examined the appellee was introduced on his behalf. Dr. Charbonnet had known and treated the appellee over a period of about eighteen years. His testimony disclosed a record of a number of past illnesses of the appellee including jaundice, hepatitis and bronchial pneumonia. He was consulted by the appellee when the appellee reached New Orleans after being in New York. From the report of the appellee's New York doctor Dr. Charbonnet learned that the appellee had a lung condition.

Dr. Charbonnet was not, as he put it, "in that particular line" and would leave the diagnosis to Dr. LeDoux, the expert consultant whom he called in. Dr. LeDoux saw the appellee approximately twenty-four times while the appellee was at the Hotel Dieu Hospital. He found that the appellee then had pulmonary tuberculosis which apparently had been present for a year or nearly so at the time he was admitted to the hospital and that symptoms of tuberculosis had existed for about eight months. The doctor thought the X rays indicated the possibility of a tubercular condition as early as 1950 and that it was clearly so in June, 1952. A light blow on the chest he testified "would be unlikely to spread the disease, whereas a severe blow would be certainly more likely". So also, he said, tuberculosis can be aggravated by diabetes. Dr. Jacobs, who treated the appellee at the United States Public Health Hospital, testified that dormant tuberculosis could be activated and aggravated by "anything that weakens the body, whether it be a physical blow, a disease like diabetes, nutritional disturbance such as starvation or vitamin deficiency, perhaps even a severe emotional disorder can reduce the ability of the body to fight off the effects of tubercular bacilli." At the time Dr. Jacobs saw the appellee at the hospital the appellee was "very much agitated" and "very much disturbed about a number of things." Either diabetes or trauma, he stated, or a combination of the two could have aggravated the appellee's preexisting tubercular condition. He told of a study made by him of diabetes and tuberculosis and testified "that people with diabetes are inordinately susceptible to developing tuberculosis, perhaps one to five times as great as the general population."

The appellee called as one of his witnesses, Dr.

Seymour B. London, who had never examined the appellee. He testified, basing his opinion on the testimony of the other doctors given by deposition, that he thought the fall probably aggravated the appellee's condition. But he admitted there were other factors which might have caused the aggravation of the tuberculosis and he had no way of telling which, and that it might have been any one or all of them.

The rule as to the medical testimony respecting causation which is required to take a case to a jury has been thus stated:

"It appears to be well settled that medical testimony as to the possibility of a causal relation between a given accident or injury and the subsequent death or impaired physical or mental condition of the person injured is not sufficient, standing alone, to establish such relation. By testimony as to possibility is meant testimony in which the witness asserts that the accident or injury 'might have', 'may have', or 'could have' caused, or 'possibly did' cause the subsequent physical condition or death or that a given physical condition (or death) 'might have', 'may have', or 'could have' resulted or 'possibly did' result from a previous accident or injury — testimony, that is, which is confined to words indicating the possibility or chance of the existence of the causal relation in question and does not include words indicating the probability or likelihood of its existence. * * * 135 A. L. R. 516."

The foregoing rule has been stated and applied in *Beckett*.

v. Prudential Insurance Co., 10th Cir. 1951, 186 F. 2d 662; and *Chicago Great Western Railway Co. v. Smith*, 8th Cir. 1955, 228 F. 2d 180. And see *New York Life Ins. Co. v. Trimble*, 5th Cir. 1934, 69 F. 2d 849; *Southern Stevedoring Co. v. Henderson*, 5th Cir. 1949, 175 F. 2d 863; *Fort Worth & Denver City Ry. Co. v. Smith*, 5th Cir. 1953, 206 F. 2d 667. The least that the appellee was required to prove was that the aggravation of his tubercular condition was probably caused by the incident on shipboard. The most that he established was that the incident was a possible cause of the aggravation. This was not enough. The motion of the appellant for a directed verdict should have been granted and judgment for it will be here rendered.

REVERSED AND RENDERED.

RIVES, Circuit Judge, Dissenting:

The jury had a right to believe that the appellee was violently knocked down and washed some twenty-four feet along the deck into the chains around the ship. His skin was scratched and scraped on the deck, his shirt ripped open, his khaki pants torn on the seat, his head, shoulder, back, and ribs struck so hard that he thereafter made complaints about them to the Captain. Within a short time he became ill, and within about two weeks his illness was diagnosed as active tuberculosis. Before his injury in April, 1953, the appellee had been examined repeatedly by Dr. Charbonnet throughout the latter part of 1952, and as late as February 1953, two months before

the accident, and Dr. Charbonnet had found no chest difficulties and no reason to suspect tuberculosis.

In reaching their verdict the jurors were not confined strictly to the opinions of the physicians, indeed those opinions were not binding on them. The jury had the right, and was under the duty to take a broader view, and to consider *all* of the facts and circumstances disclosed by the evidence. Upon such a view, I would agree with the district court that there was substantial evidence to support the verdict of the jury. I, therefore, respectfully dissent.

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1958

CASE No. ~~111~~ 6

DANIEL J. SENTILLES,

Petitioner,

v.

INTER-CARIBBEAN SHIPPING CORPORATION,

Respondent.

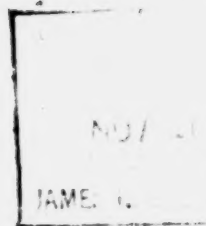
PETITIONER'S REPLY BRIEF

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CLERK
U. S. COURT

No. 488

IN THE



Supreme Court of the United States

1959
DANIEL J. SENTILLES,

Petitioner,

v.

INTER-CARIBBEAN SHIPPING CORPORATION

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH
CIRCUIT**

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IN THE
**SUPREME COURT OF THE
UNITED STATES**

October Term, 1958

CASE No. 448

DANIEL J. SENTILLES,

Petitioner.

v.

INTER-CARIBBEAN SHIPPING CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF

INTRODUCTION

Since the purpose of a reply brief is to do precisely what the adjective implies, the Petitioner will note herein those portions of the Respondent's brief that appear to require comment.

RESPONDENT'S STATEMENT OF FACTS

It is fundamental that the party who receives a favorable jury verdict and judgment in the trial court is thereafter entitled, on appeal, to the most favorable interpretation of facts that the jury could have drawn from

IN THE
Supreme Court of the United States

DANIEL J. SENTILLES,

Petitioner,

v.

INTER-CARIBBEAN SHIPPING CORPORATION

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH
CIRCUIT**

STATEMENT OF THE CASE

The History

Plaintiff sued defendant and Ben W. Lamson, and claimed, in his amended complaint, injuries and damages caused by defendants' negligence and or failure to provide a seaworthy vessel, allegedly resulting in his being "struck by seas" (R. 6). Defendants denied all allegations of negligence, unseaworthiness, proximate causation and damages (R. 10-12). Defendant Lamson moved for, and received (R. 19-20), a summary judgment—thus leaving respondent as the sole defendant below.

At a jury trial on April 8, 1957, plaintiff was awarded a verdict of \$20,000 (R. 22) and final judgment for plaintiff was entered on that same date (R. 22-23). Defendant had moved for a directed verdict at the end of plaintiff's evidence (R. 200-01) and had repeated this motion at the close of all the evidence (R. 202). The trial court denied these motions (R. 201, 202), which

the evidence adduced. It is therefore interesting to note that the Respondent does not, and can not, directly attack the Petitioner's statement of facts but, instead, provides this Court with a new interpretation of the evidence, viewed in the light most favorable to the Respondent's case. We feel constrained therefore to state the obvious: *The jury trial below resulted in a verdict for the Petitioner, not for the Respondent.* The Petitioner was, and is, therefore entitled to the statement of facts provided in his Petition (pp. 5-6), which finds clear support in the evidence adduced below. To save time and space, the Petitioner simply re-avers the statement of facts above-mentioned.

RESPONDENT'S ARGUMENT

The petitioner agrees that he was required to prove that "the aggravation of his tubercular condition was probably caused by the incident on shipboard" (Opinion below, R. 216). The Respondent's brief insists (p. 6) that "the most any doctor stated was that there 'could' be a connection." The Petitioner can best answer that contention by direct reference to some of the testimony below.

Dr. London, a chest specialist, testified:

* * * *

(R. 75)

"Q. Based upon your having read these depositions of these treating Doctors, the deposition of Dr. Jacobs and Dr. LeDoux, do you have an opinion, based upon the information contained therein, and the facts presented thereby, as to whether or not this man's fall aggravated his pre-existing latent tubercular condition?

were both predicated upon identical grounds, including: (1) There is no evidence that the injuries complained of were in any way caused by any action or lack of action on the part of defendant; (2) There is no evidence establishing the onset of plaintiff's illness on the Ship; and (3) There is no evidence upon which reasonable men could differ on the questions of * * * [the] proximate cause of the accident and or causal relationship of the accident to the injuries so as to hold the defendant responsible. Defendant moved the Court to set aside judgment and to enter judgment in accordance with defendant's motion for directed verdict made at the close of all of the evidence, and, alternatively for a new trial (R. 23-29). The trial court denied these motions on May 7, 1957 (R. 203-04), and defendant filed its notice of appeal on May 7, 1957 (R. 203). These rulings of the trial court are set forth in the "Points on which Appellant Intends to Rely on Appeal" [Nos. 1, 2, 3] (R. 203).

The Facts

Plaintiff, a refrigeration engineer, was hired as general manager by defendant in 1950 for the primary purpose of overseeing all phases of the operation of the vessel (a banana boat) (R. 150). He signed himself on this particular voyage as chief engineer although he was not a regular crew member (R. 151). In April, 1953, Plaintiff was crossing an open deck as he returned from some repair work in a forward hold, and he was struck by seawater that came over the side of his ship in rough weather, resulting in his falling to the deck. He soon complained of a cough and did only light work until the end of the voyage, 3 or 4 days later (R. 37, 161). He then traveled from Florida to Louisiana and New York (R. 161). While in New York he saw a doctor who advised him to get immediate medical care, and the plaintiff did eventually submit to medical care in New Orleans in May, 1953—about a month after the incident on board ship.

Plaintiff's medical history showed him to be a chronic diabetic of several years standing who did not

"A. From the information that I was able to glean from the testimony, it would seem that after the fall he had a sudden worsening of his general feeling of well-being, and I would have to assume at this point that this was associated with the finding of the caviteoior region by x-ray approximately two weeks later at the time of the fall, and that these are not only related temporarily, but cause and effect. I would assume that this exposure, such as it was, to the inclement weather, and the trauma to the chest, *probably* played a role in making him feel worse at this time, and *probably* aggravated his condition."
(Emphasis supplied).

(R. 144)

"Q. Doctor, as I understood your testimony here several minutes ago, you could not tell with any degree of reasonable medical probability whether this man's trouble was brought on acutely, as you say, by malnutrition, infection or trauma or blow. Isn't that still your testimony?"

"A. Those were the various factors that could produce this type of condition.

"Q. I am asking you, isn't it your testimony that you cannot tell us which one of those was the cause with any reasonable probability, knowing the background that the man had?"

"A. I believe I have already testified that I thought that the trauma to the chest was the precipitating factor."

follow his medication closely (R. 53, 65, 87). It further revealed that he had suffered from persistent hoarseness, colds, coughs and cold sweats for 6 to 8 months prior to the accident (R. 87). These symptoms were accompanied for 3 years by a general feeling of tiredness—"malaise"—which had worsened within the year prior to the accident (R. 87). X-rays taken in 1950 showed a tubercular fibrotic infiltration in the left lung (R. 90). 1952 X-rays showed this infiltration to have increased during the two year interim (R. 90). The X-rays taken shortly after his shipboard accident revealed a progressive development of the tubercular condition (R. 94).

One of plaintiff's treating physicians stated that he knew of no case where trauma had caused TB (R. 57). Another such witness stated he did not think plaintiff's TB became active at the time of the accident, although in answers to hypothetical questions he did state that the accident "could" have aggravated an existing condition (R. 129). This doctor saw plaintiff 12 times and the accident was never mentioned by plaintiff, either in the giving of his history or otherwise (R. 124). As to what actually caused plaintiff's TB, this witness said he could not state whether the diabetic condition or the trauma caused or activated the TB (R. 126); his reasoning was that there existed no evidence that would point to one cause rather than the other (R. 126). He further stated that plaintiff's medical history showed he was susceptible to TB without trauma (R. 125).

Another of plaintiff's treating doctors said the TB had been active since approximately June, 1952 (R. 92, 99), almost one whole year prior to the accident. He further stated the pulmonary TB was a slowly developing condition (R. 99). In his opinion the X-rays of 1950, 1952 and 1953 showed the development of progressive TB (R. 94). There was no basis whatsoever, said this doctor, to state that plaintiff's condition had suddenly become worse or acute or unusual (R. 92, 93, 102).

The only doctor who testified in person at the trial was the only doctor who had never personally seen

"Q. Restrict ourselves to what we know here. To what we know, what would you say are the three possibilities on this man? Would they be the three you already told us about?"

"A. From the information I have gleaned from the testimony of the previous physicians that examined the patient and from the other information, I would feel that this man had an aggravation of his condition following this incident, whatever it was, that he injured his chest and that trauma produced an aggravation."

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Dr. Jacobs, a chest specialist, stated:

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"Q. You have stated that the blow of the chest and diabetes, in your opinion, in this case were both contributing causes to the activation or aggravation of the preexisting dormant condition, is that correct?"

"A. Yes, sir."

.

The Petitioner and Respondent are agreed as to the law which applies to the facts herein. Their divergence of opinion arises in *applying* the law to the facts. The Petitioner simply contends that the jury was entitled to believe the foregoing excerpted testimony, and that such testimony

plaintiff—Dr. London. In answer to hypothetical questions he stated that plaintiff's TB could have been caused by either (1) Diabetes or (2) Malnutrition or (3) Trauma (R. 136, 137, 142, 143, 145); he stated several times that there was no way for him to venture an opinion as to which of these 3 factors caused or contributed to plaintiff's condition (R. 136, 137, 142, 143, 145). He admitted that plaintiff's prior medical history contained many symptoms consonant with the development of TB (R. 130-31, 133) and that the "night sweats" which plaintiff had suffered the prior 6-8 months were a "prominent" TB symptom (R. 140) of active TB.

All of the above evidence was placed before the court in the plaintiff's case.

The hospital records bear out the history and the diagnoses as stated by the treating doctors (DX-1).

The United States Court of Appeals for the Fifth Circuit had the case before it on briefs and oral arguments. On June 9, 1958, that court reversed the trial court and ordered the entry of judgment for respondents. (See Appendix in the Petition; also R. 211-217.) Petition for rehearing was denied.

ARGUMENT:

The question before the Court of Appeals was whether plaintiff must prove a causal connection between the accident and the illness, or may he merely show the accident and then receive a jury verdict even though his own evidence shows absolutely no reasonable medical probability that the incident caused the injury. In fact, here plaintiff is asking for a verdict even though his evidence affirmatively proves that his illness had existed long prior to the accident and had not shown any sudden or recent developments since the voyage.

is clearly not conjectural nor speculative, but meets the "probability" test outlined by the Respondent.

RESPONDENT'S REASONS FOR DENYING THE WRIT

The Respondent tells us that "the decision below is of no importance whatsoever beyond the facts of the particular case." (p.6). This is clearly not so. As already stated in the Petition (pp. 7-8), the decision below clearly discards the probability test it attempts to endorse. The Opinion clearly required the Petitioner to prove not only that his fall *probably* aggravated his tubercular condition, but also that *no other factor could possibly have had the same result*. Thus, the decision below does violence to all the federal cases it cites, and, indeed, to all federal cases which correctly hold that medical testimony must be confined to probabilities, but does not require absolute certainty.

On this ground alone, the instant case is subject to review under Rule 19 of this Court.

Certiorari should lie herein for another important reason, stated by this Court in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 509, 17 S.Ct. 443, 450, 1 L.Ed.2d 493. Although the *Rogers* decision arose from an F.E.L.A. case, the following quotation would be just as apt in a case under the Jones Act, as here:

"Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the liti-

The law on proof of medical causation is well recognized by the courts and the annotators, as well as by the text writers.

A recent decision by the Court of Appeals for the Eighth Circuit succinctly puts it thusly:

"The great weight of authority supports the rule that medical expert testimony to be sufficient to take the case to the jury must be to the effect that the accident or injury probably caused the Insured's death; and that testimony to the effect that a causal connection between the accident or injury and Insured's ensuing death was possible, such as testimony that the accident or injury 'might have,' or 'may have,' or 'could have' caused the death of Insured, is insufficient to take the case to the jury, because such testimony leaves the issue in the field of conjecture and permits the jury to speculate or guess as to the cause of death." *Chicago, G. W. Ry. v. Smith*, 228 F. 2d 180, 182 (8th Circ. 1955).

The annotation in 135 ALR 516, states, at P. 157:

"It appears to be well settled that medical testimony as to the possibility of a causal relation between a given accident or injury and the subsequent death or impaired physical or mental condition of the person injured is not sufficient, standing alone, to establish such relation. By testimony as to possibility is meant testimony in which the witness asserts that the accident or injury 'might have,' 'may have,' or 'could have' caused, or 'possibly did' cause the subsequent physical condition or death or that a given physical condition (or death) 'might have,' 'may have,' or 'could have' resulted or 'possibly did' result from a previous accident or injury * * * testimony, that is, which is confined to words indicating the possibility or chance of the existence of the causal relation in question and does not include words indicating the probability or likelihood of its existence, see as supporting the foregoing propositions, the following decisions."

¹ All emphasis in quoted portions of brief is supplied unless otherwise noted.

gants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present Congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction.

* * * * *

" . . . Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

CONCLUSION

In its consideration of Dr. London's testimony the Circuit Court of Appeals ignored the very evidentiary test it annotated so well.

In its consideration of Dr. Jacobs' testimony the Circuit Court of Appeals overlooked or ignored that portion which was favorable to the jury verdict, *supra*, p. 7.

In reversing the trial court's judgment for Petitioner, and entering judgment for the Respondent instead, the Circuit Court of Appeals overlooked or ignored the fact that *some* of the Petitioner's injuries were *undisputedly* caused by the accident (Petition, p.13).

The foregoing establishes that the opinion below is inimical to all federal law which upholds the "probability"

The law being clear, there remains only the application of the legal principles to the facts: the entire medical evidence offered by plaintiff is speculative and conjectural regarding the attempted linking of the trauma to the illness. The most any doctor stated was that there "could" be a connection. Indeed, practically every doctor stated as much when answering plaintiff's counsel's futile attempts to establish proximate causation. Further, most, if not all, of plaintiff's counsel's questions were couched in terms of "can" or "could there be" a connection (e.g., R. 94-95).

Dr. Jacob's (R. 103-130) testimony in this regard is permeated with qualifications such as "could," "could very well be," "can," "could have," "likelihood," "possibility." Then he states that he can't say which caused the TB—Diabetes or Trauma—and that either would be sufficient (R. 126). He "doubts" that plaintiff contracted TB on the ship (R. 129) and when pressed by the speculative question "could it" have been, the doctor unequivocally answered "I don't think so." (R. 129).

Dr. Ledoux considered plaintiff's case to have been active (for 10 months prior to the voyage (R. 98). He was too generous with his admissions of possibilities: the trauma "could" have aggravated or expedited a previously existing condition (R. 94, 95, 99, 102). Answering erroneously predicated hypothetical questions, he stated the occurrences on ship were "quite apt" and "may be" causes of acute dissemination of TB germs (R. 95), but he definitely stated there was not acute or unusual development of plaintiff's condition (R. 100, 102). He saw plaintiff over twenty times. (R. 89).

REASONS FOR DENYING THE WRIT

Respondent respectfully submits that this petition should be denied for the following reasons:

1. The decision below is of no importance whatsoever beyond the facts of the particular case.

2. The questions before it were correctly decided by the Court of Appeals.

3. The questions presented for review are nothing more than an attempt to obtain for petitioner still another complete evaluation of all the medical evidence in the case.

4. None of the questions presented for review are within the scope of Rule 19 of this court nor are they within this court's interpretation of its "sound judicial discretion" pertaining to the granting of writs of certiorari. See *Rice v. Sioux City Cemetery*, 349 U. S. 70, 75 S. C. 614, 99 Law Ed. 897 (1955).

CONCLUSION

Plaintiff recovered \$20,000 from a sympathetic jury for a tubercular condition that had been active at least 10 months prior to the alleged cause of the illness. His own evidence showed that he had been progressively "symptomatic" of TB for several years. His evidence linking the accident to the illness not only was speculative to the point of being totally without weight, but it went even further and affirmatively proved by substantial and definite evidence that he had not received any injury as a result of the accident. Plaintiff's own case showed that the defendant was not liable to him. The trial court should have ruled in accordance with the defendant's trial and post trial motions, but it having failed to do so, the Court of Appeals had no alternative but to reverse the judgment.

The respondent respectfully submits that the petition should be denied.

Respectfully submitted,

GEORGE F. GILLELAND
Counsel for Respondent,
627 Ingraham Building
Miami 32, Florida

test for expert testimony, and a prima facie deprivation of the right to jury trial guaranteed the Petitioner by the Constitution, the Jones Act, and the decisions of this Court.

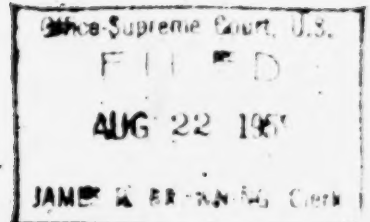
WHEREFORE, this Court is respectfully requested to grant a writ of certiorari herein.

Respectfully submitted

KELNER & LEWIS,
MILTON KELNER,
Counsel for Petitioner,
25 West Flagler Street,
Miami, Florida.

LIBRARY

U. S. SUPREME COURT



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. [REDACTED] 6

DANIEL J. SENTILLES,

Petitioner,

v.

INTER-CARIBBEAN SHIPPING CORPORATION,

Respondent.

PETITIONER'S BRIEF ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MILTON KELLNER and JOHN K. LEWIS

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25 West Flagler Street

Miami, Florida

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No. 448

DANIEL J. SENTILLES,

Petitioner,

INTER-CARIBBEAN SHIPPING CORPORATION,

Respondent.

PETITIONER'S BRIEF ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Daniel J. Sentilles, respectfully prays that this Court reverse a judgment of the United States Court of Appeals for the Fifth Circuit which reversed a judgment of the United States District Court for the Southern District of Florida. The District Court judgment had been entered in favor of the Petitioner pursuant to a jury verdict resulting from his seaman's suit for personal injuries.

OPINIONS OF THE LOWER COURTS

No opinion was rendered by the trial court. The majority and dissenting opinions of the Fifth Circuit Court

of Appeals are reported at 256 F.2d 156, and appear in the record before this Court (R. 105-109).

JURISDICTION OF THIS COURT

This Court has jurisdiction to review the judgment complained of by writ of certiorari, 28 U.S.C., Sections 1254 (1) and 2101 (c). Certiorari was granted by this Court on March 2, 1959. 359 U.S. 923, 79 S.Ct. 604, 3 L. Ed.2d 627. This brief on behalf of the Petitioner is being filed on or before August 25, 1959, pursuant to Supreme Court Rule 41 (1).

STATUTE INVOLVED

THE JONES ACT

41 Stat. 1007

46 U.S.C.A. Section 688—Recovery for injury to or death of seaman

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regu-

lating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

QUESTIONS PRESENTED FOR REVIEW

1. In establishing a prima facie causal relationship between an accident and subsequent acute tuberculosis, is the plaintiff-seaman required to adduce medical testimony which excludes every other possible cause of his condition?
2. Can a federal appellate court, after a jury verdict and judgment for plaintiff-seaman, ignore medical testimony which clearly presented a jury question and reverse the judgment for alleged failure of medical proof?
3. Can a federal appellate court, after a jury verdict and judgment for plaintiff-seaman in a personal injuries action, enter judgment for the defendant-employer where (a) at pre-trial conference counsel for the defendant admitted that the plaintiff had sustained *some* injury, and (b) undisputed testimony established at least *some* injury.

STATEMENT OF THE CASE

HISTORY

The Petitioner initiated his suit for personal injuries in a state court. The Respondent had the cause removed to the United States District Court for the Southern District of Florida. The amended complaint asked for money damages arising from personal injuries sustained as a

result of the Respondent's negligence and or failure to provide a seaworthy vessel. The Petitioner also asked for maintenance and cure (R. 4-4). The Respondent denied all allegations of negligence, unseaworthiness, proximate causation, and damages (R. 4-6).

The cause proceeded to trial and resulted in a jury verdict and judgment in Petitioner's favor (R. 8-9). The Respondent took an appeal from the judgment to the United States Court of Appeals for the Fifth Circuit (R. 105). The sole question involved on appeal was the sufficiency of evidence to establish that the disabling illness of the Petitioner resulted from his shipboard accident (R. 106). The Court of Appeals reversed the lower court judgment and entered judgment for the Respondent, holding that the Petitioner had failed to prove that "the aggravation of his tubercular condition was probably caused by the incident on shipboard" (R. 108). Judge Rives dissented from the majority opinion (R. 109).

The Court of Appeals denied rehearing, with Judge Rives dissenting once more, and a Petition for Certiorari filed with this Court was granted (R. 110).

FACTS

The Petitioner was an engineer on the Respondent's ship S.S. Montego when the accident occurred (R. 105). In April, 1953, the ship encountered very rough weather on its voyage from Santa Marta, Colombia to Miami (R. 10, 91). The vessel tossed and pitched through 25-30 mile-an-hour winds and twenty foot waves (R. 11, 13, 18). The Petitioner was crossing the deck when the ship "took a very heavy sea and fell away", leaving him suspended in

the air (R. 93). He fell to the deck on his left side, hitting his head, shoulder, ribs, hip, and leg (R. 11, 94). A wave washed him twenty-four feet along the deck, into the chains around the edge of the ship (R. 12, 93). His skin was scraped and scratched by the deck, his shirt and trousers were torn, and he inhaled some sea water (R. 94, 95).

The Petitioner complained of pain in his head and side after the fall (R. 13). A day or two thereafter he developed a cough and pain in his chest (R. 16-17). He felt as though he had the flu, and was treated aboard ship for a "heavy cold" (R. 16, 95). Although he had felt well and had no cough before the accident, he was described by the ship's captain as a "pretty sick man" with persistent chest complaints when the ship reached Miami three or four days afterward (R. 14-17, 95). About ten days later the Petitioner saw Dr. Fischbach (R. 96-97). A potential diagnosis of tuberculosis was made at that time (R. 25). The Petitioner returned home to New Orleans and was hospitalized and treated for "very acute" tuberculosis (R. 64-65).

Dr. Charbonnet had been the Petitioner's treating physician since 1935 (R. 23). He examined the Petitioner in the months of May, July, August, September, and October of 1952, and found *no* evidence of tuberculosis (R. 28). An examination as late as February 1953, *two months before the accident*, revealed no chest difficulties of any kind (R. 27).

The Petitioner's chest was X-rayed in June, 1950. The X-ray taken at that time showed a small, scarred, *inactive* area in the left mid-lung field (R. 53-54). An X-ray taken in May, 1952 gave no evidence of tuberculosis (R.

27-28). A third X-ray, taken about a month after the Petitioner fell, showed a cavity in the left lower lung field, with a fluid level and marked peripheral reaction (R. 51).

Medical testimony established that inactive tuberculosis is often present in a person, and that a blow to the chest can reduce the body's ability to fight off the tubercular bacilli (R. 39, 70-71). It was further stated that the Petitioner's accident could have had the effect of flaring up a previously inactive disease process, and that a severe blow to the chest can cause an active and rapid spread of tuberculosis from an inactive or latent source (R. 54, 57-58). Against this general background, specific and far more significant medical testimony was offered for the jury's consideration. Since that testimony is the crux of the Petitioner's argument, it will be presented therein to avoid seemingly needless repetition.

ARGUMENT

1. *The opinion of the federal appellate court is, per se, ample proof that the court demanded medical testimony which excluded every possible cause of Petitioner's condition other than his fall, in direct contravention of all law on the subject.*

It will be conceded, as stated in the Court of Appeals' majority opinion, that the Petitioner, in submitting the items of damage relating to tuberculosis, was required to prove that "the aggravation of his tubercular condition was probably caused by the incident on shipboard" (R. 108). Referring again to that opinion, the following will be found (R. 107-108):

7
"The appellee called as one of his witnesses, Dr. Seymour B. London, who had never examined the appellee. He testified, basing his opinion on the testimony of the other doctors given by deposition, that he thought the fall *probably* aggravated the appellee's condition. But he admitted that there were other factors which *might* have caused the aggravation of the tuberculosis and he had no way of telling which, and that it *might* have been any one or all of them". (emphasis supplied).

The foregoing quotation, in and of itself, shows that the appellate court did not apply the proper evidentiary test in determining whether or not the jury verdict and judgment could be reversed. Obviously that court decided that the testimony that Petitioner's fall *probably* aggravated his tubercular condition was not enough. *The court's opinion, and judgment, required that he prove that no other factor could possibly have had the same result.* Such an evidentiary burden is unheard of in a civil suit, and surpasses even the reasonable doubt requirement of criminal prosecution.

On at least three separate occasions Dr. London testified that the Petitioner's accident probably aggravated his tuberculosis:

(R. 42-43)

"Q. Based upon your having read these depositions of these treating Doctors, the deposition of Dr. Jacobs and Dr. LeDoux, do you have an opinion, based upon the information contained

therein, and the facts presented thereby, as to whether or not this man's fall aggravated his pre-existing latent tubercular condition?

"A. From the information that I was able to glean from the testimony, it would seem that after the fall he had a sudden worsening of his general feeling of well-being, and I would have to assume at this point that this was associated with the finding of the caviterior region by x-ray approximately two weeks later at the time of the fall, and that these are not only related temporarily, but cause and effect. I would assume that this exposure, such as it was, to the inclement weather, and the trauma to the chest, *probably* played a role in making him feel worse at this time, and *probably* aggravated his condition."

(Emphasis supplied).

(R. 86-87)

"Q. Doctor, as I understood your testimony here several minutes ago, you could not tell with any degree of reasonable medical probability whether this man's trouble was brought on acutely, as you say, by malnutrition, infection or trauma or blow. Isn't that still your testimony?

"A. Those were the various factors that could produce this type of condition.

"Q. I am asking you, isn't it your testimony that you cannot tell us which one of those was the

cause with any reasonable probability, knowing the background that the man had?

"A. I believe I have already testified that I thought that the trauma to the chest was the precipitating factor."

* * * *

(R. 88)

"Q. Restrict ourselves to what we know here. To what we know, what would you say are the three possibilities on this man? Would they be the three you already told us about?

"A. From the information I have gleaned from the testimony of the previous physicians that examined the patient and from the other information, I would feel that this man had an aggravation of his condition following this incident, whatever it was, that he injured his chest and that trauma produced an aggravation."

* * * *

It is respectfully submitted hereby that the jury properly could, and apparently did, believe the foregoing testimony and determine that the Petitioner's fall aggravated his tuberculosis. In *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35, 61 S.Ct. 409, 412, 88 L.Ed. 520, this Court held:

" . . . The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury.

not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable (citation omitted). That conclusion, whether it relates to negligence, causation or any other factual matter cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

It is implicit in the opinion under attack that the Court of Appeals chose to ignore the above-quoted and determined, by judicial fiat, that the jury *was not entitled to believe* Dr. London when he stated that the accident and the disease were causally related. The federal appellate court chose to usurp the jury's function and reweigh the credibility of the witness and or the weight of his testimony. Such action has not been, and should not be, condoned by this Court. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 504, 77 S.Ct. 443, 447, 1 L.Ed.2d 493. *Webb v. Illinois Central Railroad Co.*, 352 U.S. 512, 515, 77 S.Ct. 451, 454, 1 L.Ed.2d 503.

It is not contended here that the jury could not properly have reached the same conclusion as the appellate court. However, the testimony above-quoted, standing alone, was sufficient basis for the jury's contrary decision. The federal appellate court's interference with the

jury verdict emasculated the fundamental right to jury trial guaranteed the Petitioner by the Jones Act, the Constitution of the United States, and the decisions of this Court.

2. *The federal appellate court ignored other medical testimony which supported the jury verdict.*

The majority opinion of the court below also considered the testimony of Dr. Jacobs, which was adduced at trial (R. 107). It is interesting to note that the Court of Appeals chose to consider only those portions of the doctor's testimony which were *unfavorable* to the jury verdict. Nowhere did the court mention Dr. Jacobs' testimony that traumatic aggravation of tuberculosis is *démonstrable* anywhere from a few days up to three months after injury, and that the Petitioner's case history was in conformity with that time pattern (R. 70-71). Dr. Jacobs also testified as follows:

(R. 79)

"Q. You have stated that the blow of the chest and diabetes, in your opinion, in this case were both contributing causes to the activation or aggravation of the pre-existing, dormant condition, is that correct?

"A. Yes, sir."

Obviously the appellate court either decided to ignore the above-quoted, or chose to disbelieve it, or determined that the Petitioner must prove that his fall was the *sole cause* of tubercular aggravation. Under the authorities, recovery is not limited to those instances where a given

injury is the sole cause of the resulting impairment. The wrongdoer must take the injured party as he finds him, and the concurrence of injury and disease does not defeat recovery for the consequent impairment. *Hern v. Moran Towing & Transportation Co., Inc.*, 2nd Cir., 138 F.2d 900, 902, *Hiltz v. Atlantic Refining Co.*, 3rd Cir., 151 F.2d 159, 161.

In its appraisal of the foregoing testimonial excerpt the Court's attention is also directed to a recent decision which held that under the Jones Act "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 523, 77 S.Ct. 457, 458, 1 L.Ed.2d 511.

3. *In view of the Petitioner's other undisputed injuries the appellate court had no right to reverse and enter judgment for the Respondent.*

Let us assume, *arguendo*, that the lower court was correct in holding that the Petitioner had failed to establish any causal connection between the accident and his tuberculosis. Even then the appellate court's entry of judgment for the Respondent, contrary to the jury's verdict, was improper.

The record affirmatively shows that counsel for the Respondent admitted at pre-trial conference that the Petitioner had sustained *some* injury as a result of the incident on shipboard (R. 6). Undisputed testimony established that the Petitioner sustained injuries totally unre-

lated to his chest. These included a blow to his head, shoulder, and ribs (R. 11), skin scratches on his left hip and leg (R. 94), and immersion in and inhalation of sea water (R. 93, 95).

The appellate court had no right to disregard even these minor, undisputed injuries and proceed to enter judgment against the Petitioner.

CONCLUSION

For the reasons advanced by all the foregoing, this Court is respectfully requested to reverse the judgment of the Circuit Court of Appeals for the Fifth Circuit and reinstate the jury verdict and judgment of the trial court.

Respectfully submitted,

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FILED

SEP 14 1959

JAMES R. CROWNING, Clerk

**IN THE SUPREME COURT OF THE
UNITED STATES**

October Term, 1958

No. [REDACTED] -6

DANIEL J. SENTILLES,

Petitioner,

v.

INTER-CARIBBEAN SHIPPING CORPORATION,

Respondent.

**RESPONDENT'S BRIEF ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 448

DANIEL J. SENTILLES,

Petitioner.

v.

INTER-CARIBBEAN SHIPPING CORPORATION,

Respondent.

RESPONDENT'S BRIEF ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent, Inter-Caribbean Shipping Corporation, herein files its Brief and urges that this Court either affirm the judgment of the United States Court of Appeals for the Fifth Circuit or dismiss the Writ of Certiorari as having been improvidently granted.

QUESTION PRESENTED FOR REVIEW

The only question involved here is the question upon which the trial court's judgment was appealed:

“[W]hether there was sufficient evidence that the disabling illness of the appellee was caused by the occurrences on the [defendant's ship]” (R. 106).

STATEMENT OF THE CASE

In April of 1953, petitioner—a refrigeration engineer—signed himself on as a member of the crew on respondent's vessel. Petitioner had been hired by respondent as general manager of the vessel's operations (R. 105). While at sea, petitioner fell on deck during rough weather. He was examined by doctors in Louisiana in the middle of the following month (R. 32), having left the ship within a few days after his fall (R. 15) and having gone to New York and other eastern points in the interim (R. 96).

His “family doctor” looked him over and referred him to other physicians. Not willing himself to state a “separate opinion” (R. 29) as to petitioner's condition, the doctor did state: “I do not know of any [tuberculosis] cases that were produced by trauma—” (R.30). The “family doctor” admittedly had little experience or background with tuberculosis patients and preferred to “go by the opinion of the consultant” (R. 29) that petitioner was referred to.

The consultant physician was Dr. LeDoux. He saw

Sentilles on May 1, 1953, less than a month following the incident on board ship. The doctor received a history revealing "severe diabetes" for 5 years prior, "fatigue and malaise" for 3 years prior, and "frequent attacks of hoarseness" for 8 months prior to the time of the examination. (R. 49) Upon reviewing x-rays taken of Sentilles' chest area in prior years, Dr. LeDoux found a progressive tubercular condition that was manifest in June of 1950 and that showed signs of increased infiltration into the lungs as of June 1952 (R. 51). Asked whether he thought Sentilles' fall on board ship would have "aggravated or activated" the existing condition in 1953, Dr. LeDoux unequivocally replied: "I do not think it happened" although he readily agreed that the fall could have made the symptoms worse. Again, however, the doctor said he had no record of any "sudden onset" of symptomatology as to Sentilles' condition (R. 52-53). In fact, the doctor's diagnosis was tuberculosis that was "far advanced, active one year, Class I." (R. 57) In other words, Sentilles' own doctor—and his own witness at trial—stated that the tuberculosis was active at least eleven months prior to the incident on ship (R. 57). The doctor added that the disease is a slowly developing one and that a diabetic is more susceptible to the disease (R. 57-58).

Dr. Jacobs, a specialist in TB cases, also saw petitioner in New Orleans. He did not think the disease became active at the time of the incident (R. 64). His research and studies reflected that diabetics are "inordinately susceptible [to TB] perhaps one to five times as frequently as the general population" (R. 78). His statement regarding causation is exemplary of petitioner's proof at trial: "—I would not know how to tell you which

of the two [diabetes or trauma] it is more likely was responsible in this instance" [R. 77].

Dr. London, the "expert" witness—who testified without ever seeing Sentilles—stated that the following symptoms that had been demonstrated by Sentilles for months and years prior to the incident on ship were indicative of tuberculosis or a susceptibility thereto: (1) hoarseness, (2) night sweats, (3) diabetes, (4) X-ray films showing progressive development (R. 79-82). In his opinion there existed three possible causes for petitioner's condition and he could not state "with reasonable medical certainty" which of the three was responsible (R. 83). During his sometimes evasive answers on cross-examination the trial court on two occasions summarized the testimony of this witness as being inconclusive: "He said he couldn't tell" (R. 87); "He said he can't tell whether all three of these or one of them or two of them or even other factors might have precipitated the condition —" (R. 88).

Dr. London stated repeatedly that the TB **could** have been caused by **either** Diabetes, Malnutrition or Trauma and that there was no basis for him to venture an opinion as to which **probably** caused Sentilles' illness in April of 1953 (R. 83, 84, 87, 88, 89). Highly significant is the closing portion of his testimony:

[R. 88-89]

Q. I am asking you for a reasonable medical probability, and unfortunately that is what this lawsuit is based upon.

Mr. Kelner: The Doctor has answered this question over and over again, unless I am mistaken.

If Counsel is unhappy with the answer, that doesn't mean he has the right to continue asking for an answer.

[fol. 144] The Court: I will give him one more chance.

He said he can't tell whether all three of these or one of them or two of them or even other factors might have precipitated the condition which apparently was precipitated from the record he read somewhere about the time the first of April or May.

By Mr. Beckham:

Q. It was your testimony, wasn't it, that you couldn't place the time?

A. I couldn't place the specific date.

Q. As to the middle of April?

A. That is true.

Q. What the Judge has just stated, is that your testimony?

A. In your elucidation of the problem you asked me if the man fell on a certain day and I think you gave me a date. Based on that I can say that was the probable date.

Q. Based on your testimony yesterday from reading what the symptoms were you couldn't tell that it happened at any particular time?

A. That is true.

Q. Again what I want to find out is this: What the Judge just stated, is that your testimony, that the three causes or any one of the three might have been the cause?

The Court: I think he said, could have.

A. Any one of them could have aggravated the situation or all of them.

[fol. 145] Q. There is no way of telling which? They are all three present; isn't that right?

A. No way of my telling. I have no way of telling.

Respondent will stipulate that every medical witness testified that it was "possible" that the fall activated the tuberculosis—that such a result "could" have happened.

ARGUMENT

"[W]hether there was sufficient evidence that the disabling illness of the appellee was caused by the occurrences on the [defendant's ship]" (R. 106).

If a seaman is not required to prove medical causation by "probabilities" rather than by "possibilities" this

case should be reversed. If a seaman is required to **prove** a case, however, the case should be affirmed or the Writ should be dismissed. The point involved is that simple!

It should be accentuated at the outset that this case deals with an area outside the layman's knowledge. The medical profession—like the law—requires lengthy study and apprenticeship before admitting a graduate into its ranks. The character of medical testimony in this case, therefore, is all the more important because the jury could not possibly draw any reasonable inferences from the bare facts alone. The tuberculosis causation was a matter peculiarly within the realm of the knowledge of physicians. See *Carr v Donner Steel Co.*, 207 App. Div. 3, 201 NY 604 (1923). In brief, this is no case where any person would automatically or "naturally" infer a relationship between a fall on deck and a "far advanced" case of TB. Because of the removal of the case from the "ordinary," the evidentiary rules pertaining to medical testimony were respondent's only protection at the trial of this cause. The trial court stripped much of the protective shield away but the Court of Appeals rightly restored it—at the same time holding intact the accepted standards by which such matters are adjudicated.

Sentilles was hired as a general manager of the operations of Inter-Caribbean Shipping Corporation. He signed himself on as a crew member on the voyage in question. He was working in heavy weather and fell to the decks—not an extraordinary event by maritime standards. Within a month he was diagnosed as having had active tuberculosis for a year. His own history given to the doctors is most pertinent: fatigue and malaise, night sweats, hoarseness, plus long standing diabetes. The "experts" were

unanimous in stating that these symptoms showed he had TB long before he made a crew member of himself. With all of these facts coming to light **in his own case**, Sentilles was unable to present testimony that anything occurring on the vessel **probably** had one whit to do with his unfortunate illness. Such evidence was properly held by the Court of Appeals not to comply with established law. See, e.g. the opinion in *Tennant v Peoria & P. U. Ry.*, 321 U. S. 29, 32-33, 64 S. Ct. 409, 88 L. Ed. 520, 524 (1944):

"Petitioner was required to present **probative** facts from which the negligence and the **causal relation** could **reasonably** be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all **reasonably** possible inferences favoring the party whose case is attacked'." [Emphasis added]

Specifically applicable to **medical** causation problems are the authorities collected and cited in the opinion of the Court of Appeals (R. 108). On point also are the comments in 32 C.J.S. 365-366, "Evidence" §556. A more recent decision on this legal principle is *Samanski v Mobile Seafood Co.*, 258 F. 2d 823 (5th Cir. 1958).

CONCLUSION

Traditionally the law has required proof rather than surmise. The "rule of medical probability" has developed over many years as a widely accepted criterion for cases involving intricate and perplexing problems relating to matters beyond the knowledge of laymen. The instant case is but another decision in the ever growing juris-

prudence solidifying this evidentiary rule that devolved through our common law heritage.

The Court of Appeals has certainly not ignored, circumvented or abrogated any of the controlling decisions of this Court. On the contrary, the citations herein affirmatively indicate that the applicable cases were considered and followed by that Court in its decision reversing the judgment of the trial court.

The judgment of the United States Court of Appeal for the Fifth Circuit should be affirmed or the Writ of Certiorari should be dismissed as improvidently granted.

Respectfully submitted,



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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. ~~12345~~ 86

DANIEL J. SENTILLES,

Petitioner,

v.

INTER-CARIBBEAN SHIPPING CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF ON WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1958

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PETITIONER'S REPLY BRIEF ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTRODUCTION

Since the purpose of a reply brief is to do precisely what the adjective implies, the Petitioner will note herein those portions of the Respondent's brief that appear to require comment.

The following additional symbols will be used:

"P.B." for Petitioner's main brief

"R.B." for Respondent's brief

RESPONDENT'S STATEMENT OF THE CASE AND ARGUMENT

It is fundamental that the party who receives a favorable jury verdict and judgment in the trial court is entitled thereafter, on appeal, to the most favorable interpretation of facts that the jury could have drawn from the evidence adduced. It is therefore interesting to note that the Respondent does not, and can not, directly attack the Petitioner's statement of facts (P.B.4-6), but chooses instead to provide this Court with a new interpretation of the evidence, viewed in the light most favorable to the Respondent's case (R.B.2-4). We are therefore constrained, once more, to state the obvious: *The jury trial below resulted in a verdict for the Petitioner, not for the Respondent.* The Petitioner was, and is, therefore entitled to the statement of facts appearing in his main brief (pp. 4-6), which finds clear support in the evidence and is re-averred here by reference.

In its consideration of Dr. Jacobs' testimony the Respondent apparently chooses to ignore the doctor's statement that traumatic aggravation of tuberculosis is demonstrable anywhere from a few days up to three months after injury, *and that the Petitioner's case history was in conformity with that time pattern* (R.70-71; P.B.11). The Respondent also chooses to ignore Dr. Jacobs' testimony that the blow to the Petitioner's chest and his diabetes *both* contributed to activate or aggravate an existing, but dormant, tubercular state (R.79; P.B.11).

In its reference to Dr. London, who testified as an expert witness at the trial, the Respondent blandly places quotation marks around the word "expert" (R.B.4).

Whether or not the Respondent *now* considers Dr. London a qualified expert is of small significance here. The doctor's qualifications are extensive, and a matter of record (R.37-39). The Respondent did not object to the doctor's qualifications at the time of trial, and certainly cannot complain at this time, even by the chosen form of innuendo.

Counsel for the Petitioner agree that Dr. London testified that Petitioner's tubercular aggravation *could have been* caused by diabetes, malnutrition or trauma to the chest (R.B.4). However, the doctor further stated on three different occasions that the trauma was *probably* the responsible factor (R.42-43, 86-87, 88; PB.7-9). The Respondent's argument correctly insists that the Petitioner was required to adduce testimony relating to "probabilities" (R.B.6), but its statement of the case ignores the very testimony which meets that agreed standard of proof.

The Respondent quotes at some length from a portion of its cross-examination of Dr. London (R.B.4-6). In considering the quoted portions of the doctor's testimony, it is necessary to consider the contextual background which preceded the section supplied by the Respondent's brief. Dr. London, also on cross-examination, testified as follows:

(R. 83)

"Q. Now, we had the three factors there, malnutrition, infection and injury.

"A. Any loss of his natural resistance.

"Q. Either of those three could have done it?

"A. Yes.

"Q. And you have no way of knowing which of those three did it?

"A. I have no way of knowing *specifically*."
(Emphasis supplied)

(R. 86-87)

"Q. Doctor, as I understood your testimony here several minutes ago, you could not tell with any degree of reasonable medical probability whether this man's trouble was brought on acutely, as you say, by malnutrition, infection or trauma or blow. Isn't that still your testimony?

"A. Those were the various factors that could produce this type of condition.

"Q. I am asking you, isn't it your testimony that you cannot tell us which one of those was the cause with any reasonable probability, knowing the background that the man had?

"A. I believe I have already testified that I thought that the trauma to the chest was the precipitating factor."

It is clear, after reading all of Dr. London's testimony, that he was honest enough to consider the limitations and fallibility of informed medical opinion in tracing cause and effect. His resultant inability to determine, *with certainty*, which of three factors aggravated the Petitioner's condition certainly cannot be held to have destroyed his repeated assertions that Petitioner's fall was *probably* the responsible factor. The Petitioner was not required to adduce testimony which excluded every other possible factor. *Traveler's Insurance Co. v. McKain*, 5th Cir., 186 F.2d 273, 277.

Even assuming, *arguendo*, that there were conflicts in Dr. London's testimony, the jury was entitled to resolve those conflicts in the Petitioner's favor under the rule announced in *Liberty Mutual Insurance Co. v. Thompson*, 5th Cir., 171 F.2d 723, 726:

"Moreover, it is the function of the jury, if it sees fit, to reconcile the testimony of any witness who has made inconsistent statements, or to believe only such parts of his evidence as it deems worthy of belief; and the jury is not required to reject the entire testimony of any witness merely because there are conflicts therein. . . .

"Finally, the jury is the sole judge of the credibility of the witnesses and of the weight or value of their testimony. In actions at law in the federal courts, where the evidence is such that reasonable men may fairly differ . . . the right of trial by jury is preserved by the Seventh Amendment, 'and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law'. This means that an appellate federal court should not disturb the jury's finding of fact as to the accidental cause of appellee's disease if on the trial there was any substantial evidence to support it. This is so, even though the appellate judges may not believe the fact so found to be true, since an appellate court has no constitutional right to express an opinion as to the truth or falsity of such fact, the issue being entirely within the province of the jury."

The Respondent's brief does not comment upon point

=3 of the Petitioner's main brief (pp. 12-13), and the matter contained there is restated here by reference.

CONCLUSION

1) The Petitioner was not required to prove that his accident was the *only possible way* that his tuberculosis could have been aggravated.

2) The jury was entitled to believe Dr. London's testimony that the Petitioner's fall *probably* aggravated his tubercular condition, and thereupon return a verdict for the Petitioner.

3) The jury was entitled to believe Dr. Jacobs' testimony that the Petitioner's fall contributed to his advanced tubercular state, and thereupon return a verdict for the Petitioner.

4) The appellate court below usurped the jury's function when it reweighed the evidence and or the credibility of the witnesses.

5) The Petitioner's constitutional and statutory right to trial by jury was emasculated by the appellate court below.

6) The opinion and judgment of the Fifth Circuit Court of Appeals must be reversed.

Respectfully submitted,

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